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How Did Mitch McConnell Shape the Federal Judiciary?

Last Updated August 4, 2022

HIGHLIGHTS

With McConnell's help, Trump appointed more unqualified judges than any president in the history of judicial ratings, based on assessments given since 1953 by the American Bar Association.



Executive Summary

Senator Mitch McConnell engineered a rightward shift of the U.S. federal judiciary throughout his political career, culminating in a Supreme Court decision in June 2022 when the Court's conservative majority revoked the constitutional right to an abortion by reversing *Roe v. Wade*, which had stood for almost 50 years.^[1]

Within a week of the 2016 presidential election of Donald Trump, then-Senate Majority Leader McConnell phoned the man who soon would be White House Counsel. "We have an opportunity here to do something really important for the country," McConnell told Don McGahn, whom he had known for years. "I think the most long-lasting impact we could have would be lifetime appointments to the court, particularly the circuit courts and the Supreme Court."^[2] McGahn had been campaign counsel for Donald Trump's 2016 presidential run and went on to serve as White House Counsel from January 2017 to October 2018.^[3]

Aiming for maximum influence, McConnell and McGahn formulated a plan to target the two highest courts. By the end of President Trump's term, with their help, Trump had appointed three Supreme Court justices, giving the Court a solid 6-3 conservative majority.^[4] (A president nominates a person to a court, and if the Senate confirms then the person is considered appointed.) All three of Trump's Supreme Court appointees voted to overturn *Roe v. Wade* in 2022, which was one of Trump's campaign promises.^[5] Though serving just one term, Trump appointed more Supreme Court justices than any president since Ronald Reagan.

Trump appointed 54 circuit court appellate judges in his one term, just one fewer than President Obama in his two terms, accounting for 30 percent of all appellate judges.^[6] Three of the 13 previously liberal-leaning appellate districts (in Atlanta, New York, and Philadelphia) flipped Republican. Appellate judge nominees sailed through the Senate with a 94.7 percent confirmation rate, higher than the rate of any modern president since Jimmy Carter.^[7]

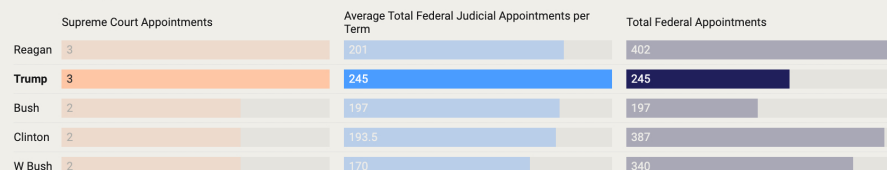
Under the leadership of then-Senate Majority Leader McConnell, Trump appointed 174 judges to district courts.^[8] These new federal judges are about four years younger on average than previous appointees, meaning they will remain on the bench longer than their counterparts.^[9] Indeed, McConnell told a Federalist Society crowd in 2019 that one of his favorite weeks during the Trump presidency was when the Senate confirmed two jurists. One was 37. The other was 39.^[10] All told, he appointed 245 federal judges, counting those on the Supreme Court, appellate courts, claims courts, and other lesser-known positions.^[11] [See Appendix B for data on judicial appointments dating back to Ronald Reagan.]

With McConnell's help, Trump appointed more unqualified judges than any president in the history of judicial ratings, based on assessments given since 1953 by the American Bar Association.^[12]

McConnell, a Republican from Kentucky, has served in the Senate since 1985. A master of the Senatorial process, he has wielded tremendous influence over the course of several presidential administrations and is the longest-serving Republican Senate leader in history.^[13] He considers his "transformation of the federal judiciary" a highlight of his career.^[14]

With McConnell's Help, Trump Appointed More Supreme Court Justices Than Any President Since Reagan

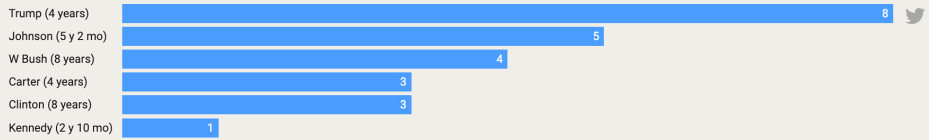
Federal judge appointments by president



Note: As of July 4, 2022. Chart sorted by total Supreme Court appointments by president. In addition to appointing three justices, Reagan also appointed a sitting justice to chief justice (William Rehnquist).
 Source: A-Mark Foundation analysis of U.S Courts data.
 Chart: The A-Mark Foundation • [Get the data](#) • [Download image](#) • Created with [Datawrapper](#)

...Including Highest Number of 'Not Qualified' Judges Confirmed In Ratings History

Total federal judges deemed 'not qualified' by the American Bar Association



Note: "Not Qualified" Federal Judges Appointed by President Since Ratings Began in 1953.
 Source: A-Mark Foundation analysis of ABA data downloaded from the Federal Judicial Center.
 Chart: The A-Mark Foundation • [Get the data](#) • [Download image](#) • Created with [Datawrapper](#)

Biography

Mitch McConnell was born in Alabama on February 20, 1942, and grew up in Louisville, Kentucky. He went to law school and was admitted to the Kentucky bar in 1967. He was an elected judge-executive of Jefferson County, Kentucky, before becoming a U.S. senator for the state of Kentucky in 1985.^[15]

Democrats and Republicans in the Senate choose a party leader for each new Congress to act as a spokesperson and coordinator of legislative strategies. The leader of the party in power is called the majority leader, while the other party's head is the minority leader.^[16] McConnell is the longest-serving Republican party leader, having held the position since 2007. He was majority leader from 2015-2021, and minority leader from 2007-2015 and 2021-present (as of July 2022).^[17]

TIME Magazine named McConnell among the 100 Most Influential People in 2015 and 2019, noting on the second occasion that his "mastery of parliamentary procedure ... has shaped the direction of the Supreme Court for generations to come."^[18] McConnell, a Baptist, said at a 2014 campaign event that he was baptized at age 8, and spoke about Christian values being under threat in the United States. "There almost seems to be a discrimination against people of faith that I don't like," he said.^[19]

A 2014 biography of McConnell claimed that he had been pro-choice and pro-union in his 20s and 30s, but shifted firmly towards conservatism after being elected to the Senate in 1985 based on his forecast that the Republican party and Kentucky would become more entrenched in those views.^[20] McConnell's own Senate biography highlights that he "led a transformation of the federal judiciary" and that his decision to "keep a Supreme Court vacancy open during the 2016 presidential election gave him the opportunity to confirm three justices as majority leader. In four years, he also prioritized the confirmation of 30% of circuit court judges nationwide."^[21] His tenure as majority leader during Donald Trump's presidency afforded him the ability to make a lasting influence on the federal judiciary.

The Evolution of McConnell's Views on Supreme Court Appointments

As a young lawyer, Mitch McConnell served as a staff assistant to Kentucky Senator Marlow Cook, a member of the Judiciary Committee during the 1970 Supreme Court nomination process that led to the eventual appointment of Harry Blackmun, who would go on to write the Court's majority opinion in *Roe v. Wade*. The Senate rejected two other Nixon nominees. When the process ended, McConnell wrote an article for the Kentucky Law Journal, published in 1970, with his recommendations for what should happen in future Supreme Court confirmations.^[22]

"Even though the Senate has at various times made purely political decisions in its consideration of Supreme Court nominees, certainly it could not be successfully argued that this is an acceptable practice," the young McConnell wrote. "At the outset, the Senate should discount the philosophy of the nominee."^[23]

The role of the Senate, he wrote, "is to advise and consent to the particular nomination, and thus, as the Constitution puts it, 'to appoint.' This taken within the context of modern times should mean an examination only into the qualifications of the President's nominee."

Over time, McConnell's views changed. On Valentine's Day weekend, 2016, McConnell, now Senate majority leader, had just landed in St. Thomas for a week-long vacation with his wife when he received news that conservative Supreme Court Justice Antonin Scalia had died.^[24]

President Obama would get to name a replacement. At the time, the Court had four liberal and four conservative justices, with Justice Anthony Kennedy often acting as a critical swing vote. Another appointment could swing that balance and influence Supreme Court decisions for years.^[25]

McConnell issued a statement that declared "the Scalia vacancy should not be filled until we have a new president."^{[26][27]} He said it was "the most consequential decision of my career" and that Democrats would do the same in an election year.

Timeline of Supreme Court Appointments While McConnell Was Majority Leader



Four weeks later, Obama named Merrick Garland, Chief Judge on the D.C. Circuit Court of Appeals, as his choice to replace Scalia. Garland had been a federal judge for 19 years, enjoyed bi-partisan support, and was in McConnell's own estimation "a well-qualified individual."^[28]

McConnell refused to schedule a Senate hearing to consider the nomination. "I didn't want it to be about the person," he said. "I wanted it to be about the process."^[29]

Josh Holmes, McConnell's former chief of staff, told PBS^[30] that McConnell believed that the initially outraged Democrats would eventually move on to the election. "His calculation, which proved correct, was that Democrats cared much more deeply about the results of a presidential election than they did about the judiciary, and that all of the time, effort and resources that they had dedicated to pushing the Merrick Garland issue, pushing the Supreme Court issue, advertising in states, that all of that would eventually evaporate about the time the nomination was secured for Hillary Clinton," Holmes said. "And sure enough that's exactly what happened."^[31]

A New York University law review essay written by University of Illinois law professors Robin Bradley Kar and Jason Mazzone concluded that McConnell's decision violated Senatorial norms and had no historical precedent.^{[32][33]} "There have been 103 prior cases in which—as in the case of Obama's nomination of Garland—an elected President nominated someone to fill an actual Supreme Court vacancy and began the nomination process prior to the election of a successor," the professors wrote. "In all 103 cases, which go back all the way to the earliest days of the Republic, the sitting President was able to both nominate and appoint a replacement Justice—by and with the advice and consent of the Senate, and regardless of the senatorial rules and procedures in place."^[34]

McConnell contradicted the very premise of the law review article he had written back in 1970, which he acknowledged in 2019 to a Federalist Society legal audience in Kentucky. "Upon reflection, everything I said was wrong," he said. "There's no doubt the confirmation process means whatever the Senate thinks at any given time."^[35]

So, when Justice Ruth Bader Ginsburg died on September 18, 2020, less than six weeks before Election Day, McConnell changed the confirmation process yet again. Rather than play by the rules he established for Obama that denied a seat to Garland, he declared that the seat would be filled immediately.

"He knew that there was going to be a chaos unleashed in the news media about the appropriateness of filling this seat, and the argument to his members is basically: 'Look, did you come here to make a difference, or did you come here just to put on a show? And if you're coming here to make a difference, this is the biggest difference you may ever make in your entire career, and it doesn't really matter how long you stay, right?'" Holmes recalled.^[36]

"He's been there for a long time, since 1985. He's watched the entire course play out of the judicial wars. This is the moment where conservatives can cement a conservative majority for generations," Holmes said.

McConnell reached Trump that night after he left a rally in Minnesota, told him of his plans, and said, "You've got to nominate Amy Coney Barrett," Holmes told PBS. Within a week, Trump named her to fill the slot, and she was confirmed in 27 days.^[37] With 293 days before the 2016 election, McConnell had refused to bring a vote on Obama's March 16, 2016, nomination of Merrick Garland to the Supreme Court.^[38] In 2020, McConnell pushed Barrett through the procedural process to a confirmation on October 26, 2020, eight days before the 2020 election.^[39]

Supreme Court Justices Appointed by President

▼ [Click on table columns to sort data.](#) ▼

🔍 Search in table

President	Years in Office	Terms	Justice Confirmed	Vote (yes/no)	Vote Margin (%)	Senate Composition
Joe Biden	2021-In Progress	In Progress	Ketanji Brown Jackson	(53-47)	53	R-50, D-48, I-2
Donald Trump	2017-2021	1 term	Amy Coney Barrett	(52-48)	52	R-53, D-45, I-2
Donald Trump	2017-2021	1 term	Brett Kavanaugh	(50-48)	51	R-52, D-46, I-2
Donald Trump	2017-2021	1 term	Neil Gorsuch	(54-45)	55	R-52, D-46, I-2
Barack Obama	2009-2017	2 terms	Elena Kagan	(63-37)	63	R-41, D-57, I-2
Barack Obama	2009-2017	2 terms	Sonia Sotomayor	(68-31)	69	R-39, D-59, I-2
George W. Bush	2001-2009	2 terms	Samuel A. Alito Jr.	(58-42)	58	R-54, D-45, I-1
George W. Bush	2001-2009	2 terms	John G. Roberts Jr.	(78-22)	78	R-55, D-44, I-1
Bill Clinton	1993-2001	2 terms	Stephen Breyer	(87-9)	91	R-44, D-56
Bill Clinton	1993-2001	2 terms	Ruth Bader Ginsburg	(96-3)	97	R-44, D-56
George H.W. Bush	1989-1993	1 term	Clarence Thomas	(52-48)	52	R-43, D-57
George H.W. Bush	1989-1993	1 term	David Souter	(90-9)	91	R-45, D-55
Ronald Reagan	1981-1989	2 terms	Anthony Kennedy	(97-0)	100	R-46, D-51
Ronald Reagan	1981-1989	2 terms	Antonin Scalia	(98-0)	100	R-53, D-47
Ronald Reagan	1981-1989	2 terms	William H. Rehnquist (elevated to Chief Justice)	(65-33)	66	R-53, D-47
Ronald Reagan	1981-1989	2 terms	Sandra Day O'Connor	(99-0)	100	R-53, D-46, I-1

Note: William H. Rehnquist was a sitting justice appointed by Richard Nixon; Reagan elevated him to Chief Justice. Senate Composition is the number of Republicans, Democrats, and Independents serving as senators at the time of the vote.

Source: United States Senate, "Supreme Court Nominations (1789-Present)," [senate.gov](#), accessed July 1, 2022.

Table: The A-Mark Foundation • [Get the data](#) • [Download image](#) • Created with [Datawrapper](#)

Changing the Rules of the Game

McConnell titled his 2016 memoir, "The Long Game," because that is how he views politics, looking far into the future. "He sees things... where they can lead 10, 15, 20, 30 and now 40 years down the line," Holmes said.^[40]

When Democrats defeated Reagan's Supreme Court nomination of Robert Bork in 1987, the young McConnell was outraged. Just two years into his Senate term, he realized that the idealistic law review article he had written was already irrelevant. The Bork decision meant that the Senate had established "judicial philosophy" as a relevant factor when considering Supreme Court nominees, he said in an October 22, 1987, speech available on C-Span. He predicted that at some point in the future, if a nominee had a philosophical stance the other party didn't like, it would "shoot them down." "We're going to do it," he warned. "We're going to do it when we want to."^[41]

In the years that followed, the confirmation process for federal judges became increasingly polarized. Democrats filibustered many of George W. Bush's appellate court nominees. They refused to schedule a hearing for two years for Miguel Estrada, nominated for the D.C. Court of Appeals, and considered someone who could one day become the first Hispanic member of the Supreme Court. Estrada

eventually withdrew from the process. Republicans were incensed.^{[42][43]}

When Obama became president, McConnell led “a disciplined, sustained, at times underhanded campaign to deny the Democratic president the opportunity to appoint federal judges,” the New York Times reported.^[44]

“Historic successes, historic delays,” read a 2013 Obama White House infographic, which complained that 69 percent of his judicial nominees had waited more than 100 days for a floor vote compared with 15 percent of Bush’s.^[45]

Finally, in November 2013, under then-Senate Majority Leader Harry Reid, the Senate lowered the voting threshold for debate on judicial appointments (except the Supreme Court) to a simple majority, which enabled Obama to get 132 judges appointed.^[46] McConnell warned Reid he would regret the move, which was considered a “nuclear option” because it was so extreme.

“I said someday the shoe will be on the other foot. Funny how that happens,” McConnell recalled.^[47]

Reid never regretted the decision. “We had over 100 judges that we couldn’t get approved, so I had no choice. Either Obama’s presidency would be a joke or Obama’s presidency would be one of fruition,” Reid told the New York Times.^[48]

When McConnell became majority leader in 2015, he again began blocking Obama’s appointments. Ever the strategist, he did not reverse Reid’s decision to lower the voting threshold. “I like where we are,” he said. “We may benefit from this.”^[49]

By the time Trump took office, there were more than 100 judicial vacancies ready for him to fill, as well as the seat that would have gone to Merrick Garland. “I’ll tell you why. I was in charge of what we did the last two years of the Obama administration,” McConnell boasted on Fox News in 2019.^[50]

A lawyer by training, McConnell had come to view the judiciary as holding more lasting power than any legislation, which could simply be undone by the next election. With lifetime appointments, there was virtually no way to remove a federal judge, barring impeachment.

As a politician, he was keenly aware of the political significance of matters that came before judges. Judicial decisions could shape critical issues involving the scope of government regulation, the environment, big business, healthcare, individual rights, abortion, gun rights, campaign finance, and more.

When Trump was elected, with Republicans controlling the Senate, McConnell realized the time had come to reshape the judiciary the way he wanted. “Before I went to bed on election night, I had resolved to make the federal judiciary my personal priority in the next Congress,” he wrote in his memoir.^[51]

He and McGahn crafted a plan to expedite the confirmation process for conservative federal judges, bypassing White House committees and the Department of Justice, which traditionally weighed in on the process.

The Federalist Society, a group of conservatives and libertarians founded in 1982 to reform “the current legal order,” became the vetting arm for Trump’s Republican federal judges. While many say that Trump outsourced the nomination process to the Federalist Society, Don McGahn, former White House Counsel under Trump, said that was misleading. “We didn’t tap into the network. We are the network,” he declared in 2019.

The Federalist Society would supply names of potential nominees. American Bar Association (ABA) ratings would be ignored. McConnell worked with then-Senate Judiciary Chairman Chuck Grassley (R-Iowa) to do away with the “blue slip” policy that allowed senators to veto nominees from their home states. Republicans had used the blue slips to deny Obama many of his nominations.^[52]

“I said to him, ‘Don, just send up the best conservative nominees you can, and as quickly as you can, and Chuck and I will take care of the rest.’”^[53] McGahn said Trump fully endorsed McConnell’s plan. “Let’s move,” Trump told him.^[54]

McConnell’s Evolving Standard for Federal Judges

The judicial selection process, centralized in the White House Counsel’s office, operated differently under Trump than in the past. Every member of the office was a member of the Federalist Society. Since nominees now needed only a simple majority vote, McGahn said they compiled long paper trails on nominees to make sure they would be the kind of judges who were skeptical of big government and believers in the rule of law. Previous administrations had avoided such documentation when there was a super majority, knowing it could lead to heated hearings.^[55]

“We wanted to see a real track record and a little bit of stretching out intellectually to see where people really were and how they would make decisions,” McGahn said.^[56] The office received input from senators, sitting judges whose clerks were in the mix, co-clerks, lawyers, and others, all to make sure that nominees would be committed to the Federalist Society ideas of originalism and textualism. Originalism means interpreting the Constitution as it was written, while textualism assumes that the meaning of a document can be found in the text itself. Trump’s first nominee to fill the Scalia seat was federal appellate court judge Neil Gorsuch, a Harvard Law graduate who had been on the 10th Circuit since 2006 and had clerked for Justices Byron White and Anthony Kennedy. He was also a prominent member of the Federalist Society, which, since his appointment, has featured lectures across the country titled “From Bork to Gorsuch: How Originalism was Mainstreamed.”^[57]

McConnell did not want any problems in getting Gorsuch confirmed. So when Democrats began filibustering the nomination, he went one step further than Reid did in 2013 and lowered the voting threshold to a simple majority for what is known as a cloture vote. Though rarely used in Supreme Court hearings—Democrats did not use the cloture vote in the Clarence Thomas confirmation hearings—the change meant that Republicans needed only a simple majority, not 60 votes, to end the debate over Gorsuch and proceed to a vote they knew they would win.^[58] The Senate then confirmed Gorsuch with a 54–45 vote.^[59]

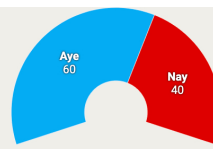
“I was not about to let Democrats block this extraordinary nominee out of spite. I had warned Democrats not to ‘nuke’ the Senate’s rules; they had ignored the Senate GOP’s views, and now they would reap the whirlwind,” McConnell wrote in his memoir.^[60] He had vowed to Reid that he would regret changing Senate rules, and now McConnell had changed them with even greater consequences.

After Trump’s election, some leading Democrats acknowledged the Reid nuclear option might have backfired. Senator Chuck Schumer (D-New York) said on CNN in 2017 that he wished it had never happened. “I argued against it at the time,” he said, adding that he thought the Supreme Court threshold “should be 60 because on such important positions there should be some degree of bipartisanship.”^[61] Senator Mark Warner (D-Virginia) told Fox News in 2021, “I wish we wouldn’t even have started this a decade ago.”^[62]

The McConnell rule change paved the way for Trump’s next two Supreme Court appointments, despite the contentious Supreme Court hearings that followed. Brett Kavanaugh assumed his post with a 50–48 vote, and Barrett’s vote was 52–48.^{[63][64]} Both those new justices were also leading members of the Federalist Society who frequently gave lectures on its behalf.

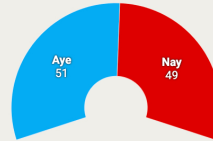
Votes Needed to End Senate Debate on Supreme Court Nominees Before April 6, 2017 (Supermajority)





Source: Congressional Research Service.
 Chart: The A-Mark Foundation • Get the data • Download image • Created with Datawrapper

Votes Needed to End Senate Debate on Supreme Court Nominees After April 6, 2017 (Simple Majority)



Source: Congressional Research Service.
 Chart: The A-Mark Foundation • Get the data • Download image • Created with Datawrapper

These successes did not cause McConnell to ease up. Toward the end of Trump’s term, bringing the possibility of a Democrat in the White House, McConnell personally began lobbying older federal judges to retire so they could be replaced with like-minded ones in case Trump lost.^[65] He also broke yet another Senate precedent by continuing to confirm judges after Election Day, apparently to fulfill his 2020 motto of “leave no vacancy behind.”^{[66][67][68]}

By the end of his presidency, Trump had appointed 245 federal judges to lifetime appointments.^[69]

ABA Qualification Ratings of Judicial Appointees

The qualifications of the judges that McConnell ushered through the Senate have come under scrutiny. While McConnell once argued that assessing a candidate’s qualifications should be the only factor in selecting a Supreme Court justice, partisanship and the nomination of candidates identifying as strict constructionists^[70] became as important as qualifications in Trump’s picks.^{[71][72][73]}

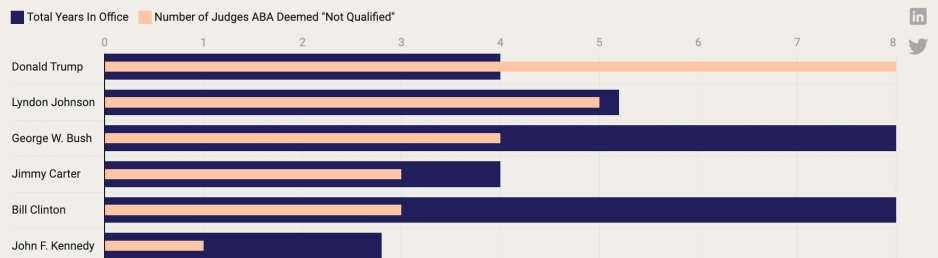
The Senate confirmed eight Trump judges who were rated “not qualified” by the American Bar Association (ABA), the most by a president since the ABA began issuing ratings in 1953.^{[74][75]} Two other nominees who were also rated “not qualified” later withdrew.^[76]

Trump is also the only recent president to nominate any person to the appellate courts with a “not qualified” ABA rating. The circuit courts are widely seen as the most important lower courts and a stepping stone to the U.S. Supreme Court. It’s possible that his Democratic predecessors do not have unqualified ratings for their nominees because they used the ABA for vetting and simply withdrew nominees that were recommended as unfit. The ABA reportedly rejected 14 of Obama’s 185 nominees as unqualified, but since that took place prior to a public nomination, their names and subsequent ratings were never disclosed, and the nominations did not go forward.^[77] Biden, however, is not using the ABA to vet his nominees, and none so far have been rated as “not qualified.”^[78]

The Trump administration argued that its judicial picks were unfairly categorized as “not qualified,” noting that several of the poor ratings were only because the nominees did not have 12 years of experience.^[79] A Clinton appointee, David Hamilton, was also rated “not qualified” because he lacked the 12 years of experience.^[80] He served as a federal district court judge, and later was nominated by Obama to the 7th Circuit with a “well qualified” ABA rating.^[81] A Vox legal writer concluded that Trump’s judicial bench included “some of the smartest, and most ideologically reliable, men and women in the conservative movement.”^[82]

The chart below shows the number of judges a president appointed that were deemed “not qualified” by the ABA since ratings began in 1953, ordered from most “not qualified” to least. Presidents not listed did not name judges who were not qualified.

“Not Qualified” Federal Judges Appointed by President Since Ratings Began in 1953

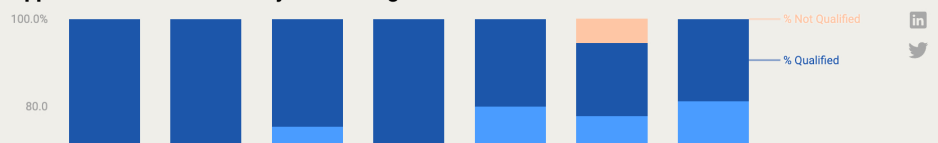


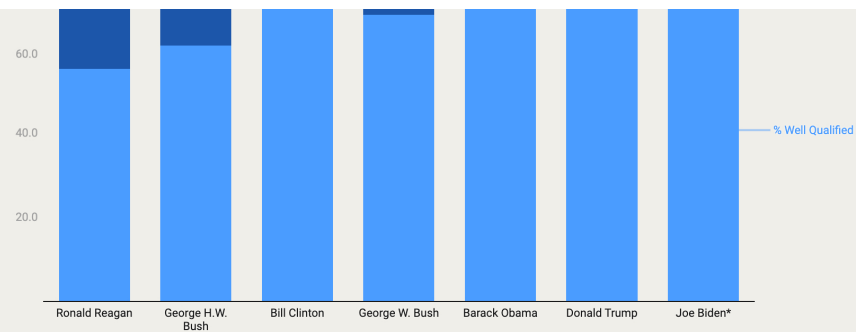
Note: “Not Qualified” Federal Judges Appointed by President Since Ratings Began in 1953.
 Source: Analysis of ABA Ratings Data from downloaded data from Federal Judicial Center.
 Chart: A-Mark Foundation • Get the data • Download image • Created with Datawrapper

The charts below show the percentage of well qualified, qualified, and not qualified judicial nominations made by each president since Richard Nixon for the appellate courts and district courts. For the appellate courts, 5.6% of Donald Trump’s nominees were rated “not qualified,” while every other president since Ronald Reagan had 0.0%. For the district courts, 2.9% of Trump’s nominees were “not qualified,” along with 1.3% of Bill Clinton’s nominees, and 1.5% of George W. Bush’s nominees. The other presidents listed had zero nominees rated “not qualified.”

Click or hover over any of the sections in the bar graphs to see the percentages for each category.

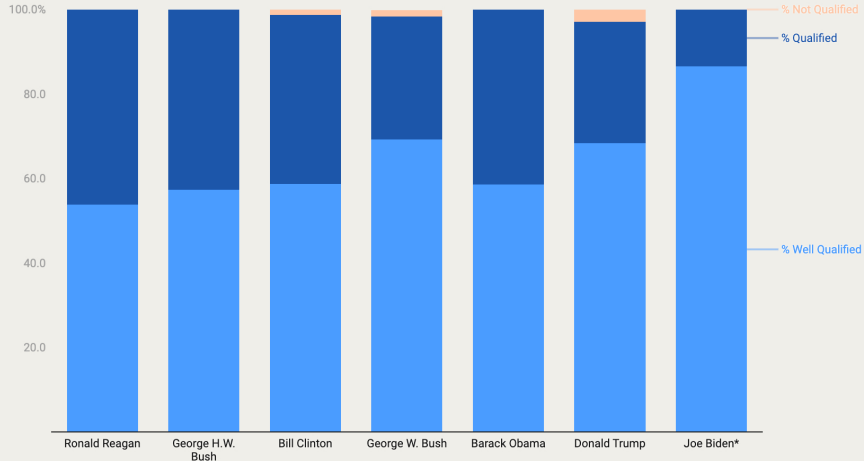
Appellate Court Nominees by ABA Rating





*As of July 11, 2022.
 Source: Table T1, *Judicial Nomination Statistics and Analysis: U.S. Circuit and Districts Courts, 1977-2020*, and data downloaded from the Federal Judicial Center.
 Chart: The A-Mark Foundation • [Get the data](#) • [Download image](#) • Created with [Datawrapper](#)

District Court Nominees by ABA Rating



*As of July 11, 2022.
 Source: Table T1, *Judicial Nomination Statistics and Analysis: U.S. Circuit and Districts Courts, 1977-2020*, and data downloaded from the Federal Judicial Center.
 Chart: The A-Mark Foundation • [Get the data](#) • [Download image](#) • Created with [Datawrapper](#)

Conclusion

The conservative shift orchestrated by McConnell in the most powerful federal courts in the U.S. will have an impact for decades. Justice Thomas, in a concurring opinion in *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe v. Wade*, suggested the Supreme Court should review its prior rulings that affirmed gay rights, gay marriage and the right to contraception.^[83] Other decisions in 2022 marked wins for the conservative movement in areas such as gun rights, religious rights, and limits on environmental regulations.^[84]

The day before the *Dobbs* decision overturning abortion rights, the Supreme Court also overturned a New York law^[85] that required anyone who carried a handgun in public to first get a permit, concluding the law violated the Second Amendment. Beyond gun control and abortion, the conservative shift was apparent in Supreme Court rulings that limited the ability of the government to regulate climate change and allowed a high school football coach to pray at public school games. The New York Times wrote that the most recent Supreme Court term was, by one measure, the most conservative since 1931.^[86]

"No one should be confident that this majority is done with its work," the liberal dissenters in the *Dobbs* case wrote, noting that the only reason the Supreme Court reversed a five-decade precedent was "because the composition of this Court has changed."^[87]

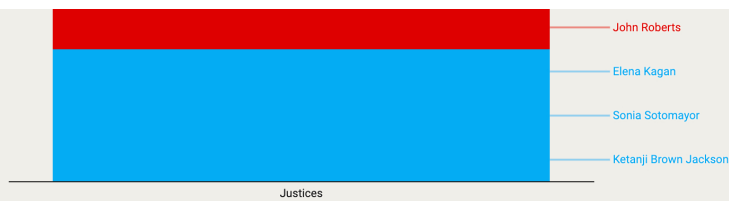
Despite President Biden's successful nomination of Ketanji Brown Jackson, 51, to the Supreme Court in April 2022, the Court still has a conservative majority, with three liberals and six conservatives.^[88] It would only lose that majority if both the Court's oldest justices, Clarence Thomas, 73, and Samuel Alito, 72, stepped down and were replaced by liberals. That does not seem likely anytime soon, given that the average age of the four most recent justices who either died or retired was 82.5. Antonin Scalia was 79 when he died; Ruth Bader Ginsburg was 87; Anthony Kennedy retired at 81 and Stephen Breyer retired at 83. Trump's picks are significantly younger: Kavanaugh is 57, Gorsuch is 54, and Barrett is 50.

That is the context in which the McConnell blockade of Merrick Garland, and his role in the speedy confirmation of Amy Coney Barrett to replace Ruth Bader Ginsburg, must be viewed. Mitch McConnell used his political power to hold as many judicial openings as possible during Obama's presidency, and sought to fill those openings with conservative nominees under President Trump. The result of that plan is already on display in recent rulings, and will continue to reverberate in the coming years.^[89]

Supreme Court Composition, by Ideology as of July 11, 2022

Conservative Justices have a majority (6 out of 9) in the current Supreme Court





Note: As of July 11, 2022.

Chart: The A-Mark Foundation • Source: FiveThirtyEight • Get the data • Download image • Created with Datawrapper

Appendix A. Process of Becoming a Federal Judge

The U.S. Constitution does not set out specific requirements to become a federal judge. Traditionally, when there is a vacancy—usually due to a sitting judge stepping down, or when Congress creates a new position—the president nominates a replacement. This is true for all federal judges, no matter the seat.^[90]

The president's choice must be confirmed "with the advice and consent" of the Senate. In practice, all names are first sent to the Senate Judiciary Committee, which holds a hearing, before a full Senate vote.

Since 1953, the American Bar Association's 15-member Standing Committee on the Federal Judiciary has submitted independent evaluations of Article III judicial nominees to the Senate Judiciary Committee, evaluating only their professional qualifications, not "philosophy, political affiliation or ideology."^[91] The ABA's ratings today are "well qualified," "qualified," or "not qualified." Article III judgeships include those on the Supreme Court, district and circuit courts.

The non-partisan process includes confidential interviews with at least 40 of the nominee's colleagues, as well as a review of their legal writings, and any disciplinary issues. Nominees are also questioned and given the opportunity to respond to any adverse findings. If an evaluator finds the nominee "not qualified," then a second review takes place and both reports are sent to the full Standing Committee. On rare occasions, the evaluator may find the nominee qualified, but the full committee may disagree. In those cases, a second review occurs. The final rating is based on a majority vote of the Standing Committee.^[92]

In 2001, President George W. Bush halted the practice of giving the ABA the names of nominees before they were selected, a practice that Trump followed.^[93] Biden has also decided not to use the ABA for pre-nomination vetting so he can speed up his judicial nominations. The ABA continues to rate nominees, however, but only after the names are public.^[94]

The Federalist Society, a group of conservatives and libertarians founded in 1982 to reform "the current legal order," became the vetting arm for Trump's Republican federal judges.^[95] While many say that Trump outsourced the nomination process to the Federalist Society, Don McGahn, former White House Counsel under Trump, said that was misleading. "We didn't tap into the network. We are the network," he declared in 2019.^[96] [Learn more about the Federalist Society in Appendix C.]

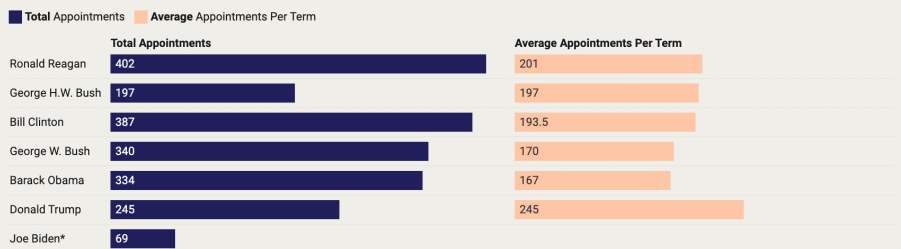
The unlikely marriage of Trump and the Federalist Society was cemented when he agreed to publicize a list of conservative judges he would name to the Supreme Court if elected. Leonard Leo, Federalist Society executive vice president, served as Trump's unofficial judicial advisor, continuing a role he had with George W. Bush.^[97] The list was Trump's idea; the names came from Leo.^[98]

Trump needed the conservative support, and the conservatives wanted his reassurances that he would support their priority to get judges who supported their ideology on the bench. "The establishment of the list reassured a lot of skeptical Republicans on the inside, and then by the fall, on the outside," McConnell said, "and became the single biggest issue to bringing our side in line behind him and allowed him, in part, to win the election."^[99]

Appendix B. Judicial Appointments by President

The charts below show the total number of federal judge appointments and the number of appellate court judge appointments made by each president since Ronald Reagan. Donald Trump had a higher number of appointments in his one term than the average per term for any two-term president listed.

Federal Judge Appointments by President

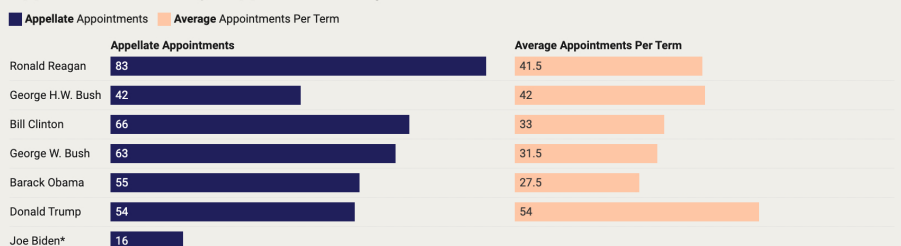


*As of June 21, 2022.

Source: United States Courts, "Judgeship Appointments by President," December 31, 2021, and Ballotpedia, "Federal Judges Nominated by Joe Biden," ballotpedia.org, accessed on July 11, 2022.

Chart: The A-Mark Foundation • Get the data • Download image • Created with Datawrapper

Appellate Court Judge Appointments by President



The chart below shows the number of judges confirmed during Donald Trump's presidency and Mitch McConnell's run as majority leader. Nearly one-third of the circuit court judges were appointed by Trump.

How Trump & McConnell Changed the Appellate Courts

▼ [Click on table columns to sort data.](#) ▼

🔍 Search in table

Appellate Court	# of Trump Judges Confirmed	% of Trump Judges Confirmed	Total Judges in Circuit	R-Appointed	R-Appointed (%)	D-Appointed	D-Appointed (%)
Eleventh Circuit	6	50	12	7	58	4	33
Tenth Circuit	2	17	12	5	42	6	50
Ninth Circuit	10	35	29	13	45	16	55
Eighth Circuit	4	36	11	10	91	1	9
Seventh Circuit	5	46	11	7	64	3	27
Sixth Circuit	6	38	16	10	63	6	38
Fifth Circuit	6	35	17	12	71	5	29
Fourth Circuit	3	20	15	7	47	7	47
Third Circuit	4	27	15	7	47	6	40
Second Circuit	5	39	13	6	46	7	54
First Circuit	0	0	6	1	17	5	83
DC Circuit	3	27	11	4	36	6	55
TOTAL	54	32	168	91	54	71	42

Note: Totals will not add up because of vacancies. Trump nominated one judge in the First Circuit but the nomination was withdrawn.
 Source: Data downloaded from the Federal Judicial Center, and Ballotpedia. Data as of July 5, 2022.
 Table: The A-Mark Foundation · Get the data · Download image · Created with Datawrapper

The chart below shows the number of appellate and district court nominees made by Barack Obama during his second term and by Donald Trump during his one term, and what percentage were confirmed. Mitch McConnell was Senate minority leader during Obama's first term (111th and 112th Congresses - not shown below) and the first half of his second term (113th Congress - shown below dimmed out). McConnell became Senate majority leader for the 114th-116th Congresses.

U.S. Circuit Appellate and District Court Nominees

Mitch McConnell was Senate majority leader during the 114th, 115th, and 116th Congresses.

■ Judicial Nominees ■ # Confirmed ■ % Confirmed

Barack Obama



Donald Trump



Source: Congressional Research Service, "Judicial Nomination Statistics and Analysis: U.S. Circuit and District Courts, 1977-2020," May 18, 2021.
 Chart: The A-Mark Foundation · Get the data · Download image · Created with Datawrapper

Appendix C. The Federalist Society

Having the once-obscure Federalist Society play such a significant role in judicial selections has made it "a household name," McGahn joked at a 2019 Federalist Society event at the Reagan Library. He said Democrats had long thought it a "secret club, plotting who knows what. Now it's an anomaly not to be a member."^[100]

The Society began in 1982 when conservative law students held a conference at Yale to counter liberal ideas in law classes. They quickly attracted conservative funders and support from prominent conservative law professors, including Bork and Scalia, who then became federal judges. They also earned the attention of Reagan's Attorney General, Edwin Meese, who began hiring them for good legal jobs in Washington, according to Suffolk University law professor Michael Avery, who co-authored "The Federalist Society: How Conservatives Took the Law Back from Liberals."^[101] Meese is still on the Federalist Society board of directors.

Avery said he uses the acronym M-A-I-N to think about the Federal Society. It stands for "money, access, ideas and network, and they were very successful on all those fronts."^[102]

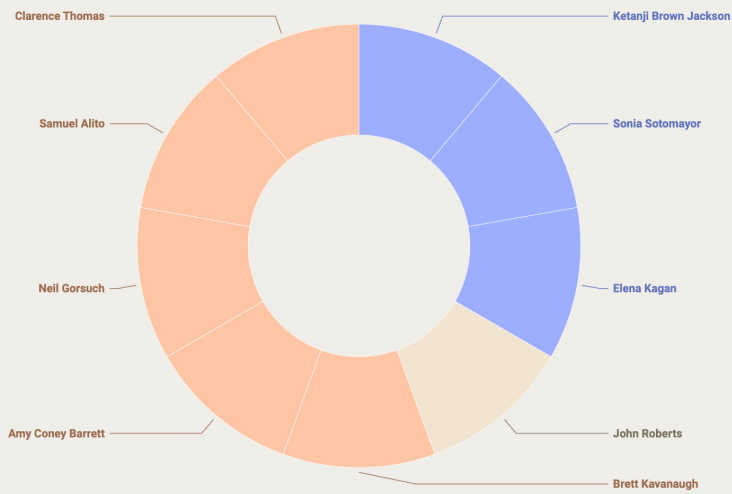
Over the years, the Federalist Society has grown significantly, and now counts 70,000 lawyers, law students, scholars and others as members. Among them are five members of the Supreme Court: Trump's three new associate justices, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett, plus Clarence Thomas and Samuel Alito. Chief Justice John Roberts said during his 2005 confirmation process that he had no memory of belonging to the Federalist Society, but he was listed in its 1997-1998 directory and he has participated in some of the organization's activities.^[103]

It reported more than \$31 million in assets to the IRS in 2020, the most recent filing available.^{[104][105]}

But that may be just the tip of an iceberg of influence. The Washington Post reported in 2019 that Federalist Society executive vice president Leonard Leo had collected more than \$250 million in hard-to-trace dark money "used in part to support conservative policies and judges, through advertising and through funding for groups whose executives appeared as television pundits."^[106]

5 out of 9 Sitting Supreme Court Justices Belong to the Influential Federalist Society

Supreme Court Justices by Membership:
In Federalist Society Not In Federalist Society Disputed Membership



Note: Chief Justice John Roberts said during his 2005 confirmation process that he had no memory of belonging to the Federalist Society, but he was listed in its 1997-1998 directory and he has participated in some of the organization's activities.

Chart: The A-Mark Foundation • [Get the data](#) • [Download image](#) • Created with [Datawrapper](#)

To Leo, a devout Catholic and former appellate law clerk who is friendly with Justice Thomas, federal judicial confirmations are now "more like political campaigns."^[107] ^[108]

The Post total did not include the Rule of Law Trust, which lists Leo as a trustee, according to IRS returns the Trust filed in 2020, a year after the newspaper report.^[109] The Trust, which formed in 2018 with \$80 million in revenue, paid a \$1.5 million consulting fee to former Federalist Society executive Jonathan Bunch in 2019, as well as \$4.3 million to the BH Group, a company owned in part by Leo. It has a mission "to advance conservative principles and causes through communications, research, strategy and assistance to other organizations." The BH Group also donated \$1 million to Trump's inaugural committee in December 2016.^[110]

The BH Fund, another group that lists Leo as its president and Bunch as its treasurer, gave \$6 million to the Judicial Crisis Network in 2019, according to the BH Group's 2019 tax return, the most recent available.^[111] The Judicial Crisis Network has been described as "the predominant dark money spender in Supreme Court confirmation fights as a vehicle for deep-pocketed donors to funnel millions of dollars behind or against judicial nominees."^[112] It is run by Federal Society member and former Clarence Thomas law clerk Carrie Severino.^[113]

To blunt the impact of the Federalist Society, progressives in 2001 created the American Constitution Society, but its funding pales in comparison. ACS reported \$8.1 million in revenue in 2019, according to its most recent IRS filing.^[114] ACS names its major sponsors on its website, including George Soros' Open Society Foundation, the JPB Foundation, the William and Flora Hewlett Foundation, several large law firms, advocacy groups, unions, and others.^[115]

In the wake of Watergate, the Federal Election Commission and Congress enacted restrictions on campaign finance, including the 2001 Bipartisan Campaign Reform Act, to add transparency and limit the influence of big money in politics, such as the dark money that has increasingly funded judicial advocacy campaigns.^[116]

Conservatives believe that the First Amendment does not allow the government to impose any restrictions on speech, and they fought to overturn an FEC ruling that limited corporate campaign spending. The Supreme Court ruled in their favor in 2010 in a 5-4 opinion (*Citizens United v. FEC*) that has led in part to the explosion of dark money now fueling the Federalist Society's goals of making the courts more conservative.^[117]

McConnell led efforts to overturn the 2001 Bipartisan Campaign Reform Act for decades.^[118] The Court has struck down parts of it and upheld others. In December 2021, McGahn, back in private practice, was lead counsel for McConnell in an amicus brief they submitted to the Supreme Court in a campaign finance lawsuit brought by Senator Ted Cruz.^[119] The Supreme Court ruled in Cruz's favor in May 2022.^[120] McGahn opposes limits on campaign spending, which led to his obstructionist tenure as a commissioner and chair of the Federal Election Commission.^[121]

Appendix D. Details on "Not Qualified" Judges Appointed by Trump

As noted in Section VI above, the Trump administration argued that its judicial picks were unfairly categorized by the American Bar Association (ABA) as unqualified, noting that several of the poor ratings were due to the nominees not having at least 12 years of experience.^[122]

Below are details on the eight federal judges appointed by Trump who received unqualified ratings from the ABA but who were confirmed by the Senate for lifetime appointments.

- Holly Lou Teeter**, nominated to the U.S. District Court for the District of Kansas on August 3, 2017.^[123] Born in 1979,^[124] she was deemed unqualified because she did not have enough trial experience.
- Charles B. Goodwin**, nominated to the U.S. District Court for the Western District of Oklahoma on January 8, 2018.^[125] While the ABA had no issue with Goodwin's "judicial temperament, intellectual capacity, writing and analytical abilities, knowledge of the law, or breadth of professional experience," they did have concerns about "his work ethic," noting he was often missing from the courthouse where he worked as a magistrate until mid-afternoon.^[126] The Senate confirmed him by a 52-42 vote on August 28, 2018.^[127]
- Sarah E. Pitlyk**, nominated to the U.S. District Court for the Eastern District of Missouri on September 9, 2019.^[128] The ABA concluded she did not have enough trial or litigation experience, noting she had never tried a case as lead counsel, examined a witness, taken a deposition, or even argued a motion in court.^[129] A former appellate clerk to now-Associate Justice Kavanaugh, she was confirmed by the Senate on December 4, 2019, by a 49-44 vote.^[130]
- Justin R. Walker**, nominated to the U.S. District Court for the Western District of Kentucky on June 24, 2019.^[131] The ABA determined that Walker lacked the requisite trial or litigation experience for the position, noting that he has never tried a case as a lead or co-counsel.^[132] He was confirmed by the Senate on October 24, 2019, with a 50-41 vote.^[133] McConnell spoke at his investiture.^[134] On April 11, 2020, Walker granted a restraining order against the city of Louisville on behalf of a group called On Fire, which wanted to have in-person Easter services during the pandemic, even though the city banned them. Notable for its

Christian rhetoric, the ruling concluded: "But for the men and women of On Fire, Christ's sacrifice isn't about the logic of this world. Nor is their Easter Sunday celebration. The reason they will be there for each other and their Lord is the reason they believe He was and is there for us. For them, for all believers, 'it isn't a matter of reason; finally, it's a matter of love,'" he wrote.^[135] Days earlier, Trump had announced his intention to nominate Walker for a seat on the powerful D.C. Appellate Court,^[136] and did so on May 4, 2020; this time, the ABA determined he was "well qualified."^[137] He was confirmed on June 18, 2020, by a 51-42 vote.^[138] A former clerk to both Kavanaugh and Kennedy, and a "star in the Federalist Society," he had known McConnell since high school and was just 37 when he became a federal judge.^[139]

5. Jonathan Kobes, nominated to the U.S. Court of Appeals for the Eighth Circuit on June 7, 2018.^[140] The ABA wrote that Kobes lacked the requisite experience to undertake the role successfully and could not "provide sufficient writing samples" to show that he could do the job.^[141] Kobes, who was general counsel to Republican Senator Mike Rounds, was confirmed on December 11, 2018, by a 50-50 vote, with then-Vice President Mike Pence breaking the tie.^[142]

6. Leonard Steven Grasz, nominated to the U.S. Court of Appeals for the Eighth Circuit on August 3, 2017, and confirmed with a 50-48 vote on December 12, 2017.^[143] The ABA's seven-page statement on why he was not qualified concluded that he was rude and so politically connected that people were afraid of reprisal for talking about him. The ABA reviewers found several instances in which his "passionately-held social agenda appeared to overwhelm and obscure the ability to exercise dispassionate and unbiased judgment."^[144]

7. Kathryn Kimball Mizelle, nominated to the U.S. District Court for the Middle District of Florida on September 8, 2020.^[145] She was 33, had clerked for Justice Clarence Thomas, and was working at Jones Day, the firm where McGahn ran the government relations practice.^[146] The ABA said Mizelle lacked experience, noting she had only been admitted to practice law in 2012, nor had she ever tried a civil or criminal case as lead or co-counsel.^[147] She was confirmed with a 49-41 vote on November 18, 2020, after Trump lost the election.^[148] She overturned Biden's mask mandate on federal transportation in April 2022 in a controversial opinion; the administration has appealed.^[149]

8. Lawrence VanDyke, nominated to the U.S. Court of Appeals for the 9th Circuit on October 15, 2019.^[150] The ABA interviewed 60 lawyers and judges and determined that VanDyke's accomplishments were undercut by his behavior, "Mr. VanDyke is arrogant, lazy, an ideologue, and lacking in knowledge of the day-to-day practice including procedural rules. There was a theme that the nominee lacks humility, has an 'entitlement' temperament, does not have an open mind, and does not always have a commitment to being candid and truthful," their report said.^[151] Confirmed with a 51-44 vote on December 11, 2019,^[152] VanDyke has since written several controversial judicial opinions dubbed "bonkers" by The New Republic.^[153]

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