

Supreme Court Nominations During Years with a Closely Divided Senate

February 18, 2022

This Insight provides information and data related to Supreme Court nominations during years with a closely divided Senate. For the purpose of this Insight, a “closely divided” Senate is defined as one for which the margin that determined majority control of the chamber was two or fewer seats. Under such circumstances, there have been 17 Supreme Court nominations submitted to the Senate during years when it was closely divided—these 17 nominations represent 10% of the [164 Supreme Court nominations](#) submitted to the Senate since 1789.

With Justice Stephen Breyer [announcing, on January 27, 2022, his intention to retire](#), and President Joe Biden [stating](#), on the same date, his intention to announce a nominee by the end of February 2022 for the anticipated vacancy on the Court, a nomination submitted this year to the Senate, with its [present party division](#), would be the 18th Supreme Court nomination submitted to a closely divided Senate (under the definition provided above).

Nominations Submitted During Past Presidencies

The first Supreme Court nomination submitted to a closely divided Senate occurred during the 3rd Congress in 1793, when a political faction of Senators that supported the Washington Administration (“Pro-Administration”) held 16 seats and a faction that opposed the Administration (“Anti-Administration”) held 14 seats. As shown by **Figure 1**, the nominee, [William Paterson](#), was [confirmed without a roll call vote](#).

Of the 17 nominations included in the figure, 10 (59%) occurred prior to the 20th century—including 3 nominations submitted during the presidency of [Andrew Jackson](#) and 3 submitted during the presidency of [Chester Arthur](#). Two nominees were also submitted to a closely divided Senate during the first term (1885-1889) of President [Grover Cleveland](#).

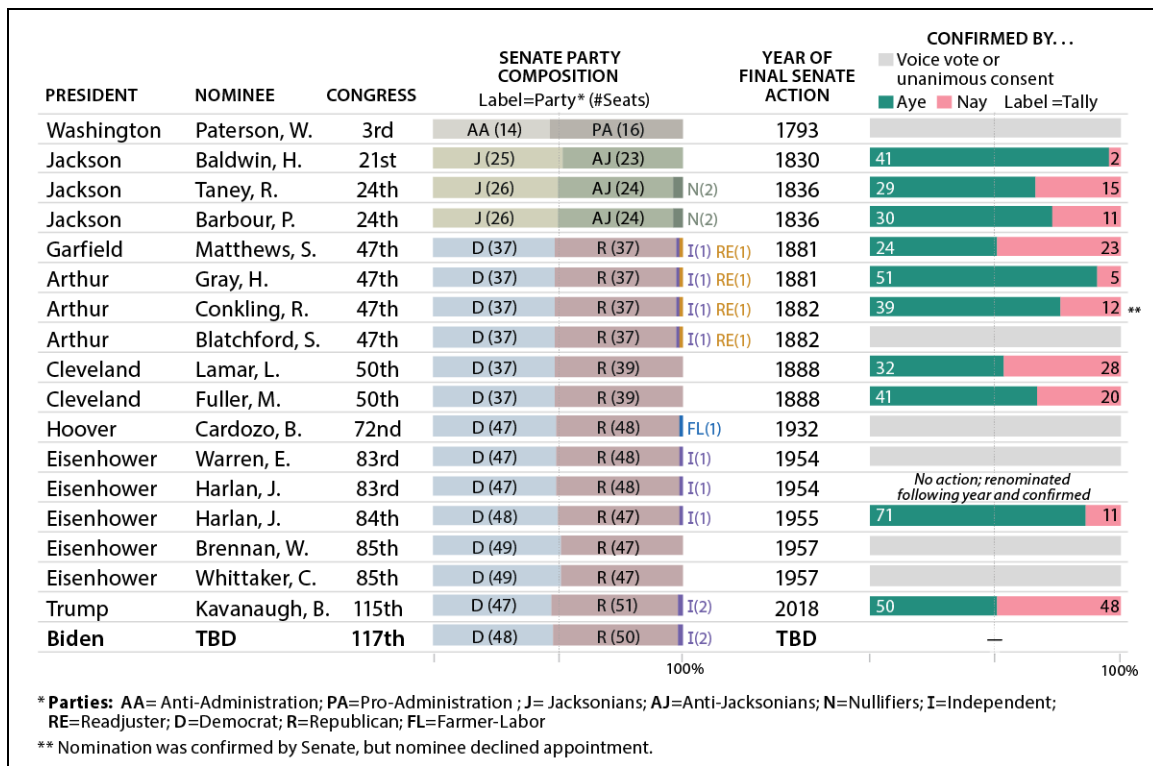
Of the 7 Supreme Court nominations that were submitted to a closely divided Senate since 1900, 5 were submitted during the presidency of [Dwight Eisenhower](#), when—during the 83rd, 84th, and 85th Congresses (1953 to 1959)—[each party held between 47 and 49 of the chamber’s 96 seats](#). The most recent Supreme Court nomination submitted to a closely divided Senate occurred during the 115th Congress, with the nomination of [Brett Kavanaugh](#) in 2018.

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Figure 1. U.S. Supreme Court Nominations During Years with a Closely Divided Senate (1790-2022)



Source: Congressional Research Service.

Note: For the purpose of this Insight, a closely divided Senate is defined as one for which the margin that determined majority control of the chamber was two or fewer seats.

Final Senate Action on Past Nominations

Figure 1 provides the year of final action on each of the past nominations to the Court when there was a closely divided Senate and also indicates whether they were approved by the Senate. Of the 17 past Supreme Court *nominations* submitted to a closely divided Senate, 16 were confirmed by the Senate ([Roscoe Conkling](#) declined the appointment after his nomination was approved).

One nomination to the Court, that of [John Harlan](#) in November 1954, was not acted upon by the Senate before it adjourned in [December 1954](#). President Eisenhower subsequently renominated Harlan to the same vacancy in January 1955 and it was approved a few months later by the Senate. Overall, of the 16 *nominees* who had nominations submitted to a closely divided Senate, all were ultimately confirmed.

A number of well-known past Justices had their nominations to the Court approved by a closely divided Senate, including Chief Justice [Roger B. Taney](#) in 1836; Chief Justice [Earl Warren](#) in 1954; Justice [Benjamin N. Cardozo](#) in 1932; and Justice [William J. Brennan, Jr.](#) in 1957.

Senate Vote Margin on Past Nominations

As shown by **Figure 1**, 10 (62%) of the 16 Supreme Court nominations approved during years with a closely divided Senate were confirmed by roll call vote and 6 (38%) were confirmed without a roll call vote. Of the 10 nominations approved by roll call vote, 7 were confirmed by a margin of at least 14

votes—with the nomination of John Harlan during the 84th Congress being approved by the greatest vote margin (60 votes).

The 3 nominations confirmed by the smallest margins during years with a closely divided Senate include the nominations of [Stanley Matthews](#), confirmed during the 47th Congress by a [margin of one vote](#) (the smallest margin of the 10 nominations approved by roll call vote); [Lucius Lamar](#), confirmed during the 50th Congress by a margin of four votes; and Brett Kavanaugh, confirmed during the 115th Congress by a [margin of two votes](#).

In terms of the percentage of Senators voting on a nomination who also voted to approve it, 7 of the 10 nominations were confirmed with the support of at least 66% of Senators who voted on the nomination. The nomination of [Henry Baldwin](#) during the 21st Congress received the greatest percentage of support (41 of 43, or 95%, of Senators voted to confirm him) whereas the nominations of Brett Kavanaugh and Stanley Matthews had the smallest percentage of Senators voting to confirm them (each receiving 51% of the support of Senators who voted).

Cross-Party Support for Past Nominations

This particular information is not provided in **Figure 1** but, despite the narrow margin of majority control in each of the years with a closely divided Senate, each nomination received at least one vote, and often at least several more, in support of the nomination from Senators *not* belonging to the same political party (or political faction) as the nominating President.

Specifically, 21 Anti-Jacksonians voted to approve the Baldwin nomination; 5 Anti-Jacksonians voted to approve the Taney nomination, as did 5 for the [Barbour](#) nomination; 14 Democrats voted to confirm Matthews; 21 Democrats voted to confirm [Gray](#); 13 Democrats voted to confirm Conkling; 3 Republicans voted to confirm Lamar; 10 Republicans voted to confirm [Fuller](#); 31 Democrats voted to confirm Harlan; and 1 Democrat voted to confirm Kavanaugh.

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