



THE WHITE HOUSE TRANSITION PROJECT

1997—2021

SMOOTHING THE PEACEFUL TRANSFER OF DEMOCRATIC POWER

Institutional Analysis Program,
Intermittent Report Series

THE “NUCLEAR OPTION” HAS FIZZLED AGAIN.

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Evidence makes clear that under the Republican majority, the Senate’s “nuclear option” has failed to shorten the appointments process for Trump nominees to the courts. This pattern repeats a failure to shorten the appointments process for Obama judicial nominations under the Democratic majority two congresses earlier.

An explanation for why deploying the nuclear option failed: while delay in nominations has a partisan element to it, the effectiveness of leadership to suppress opportunism in appointments politics plays a bigger role.

These patterns suggest the importance of transition planning, early nominations, coordination over appointments, and a focus on critical governing responsibilities.

* An earlier version of this report appeared in the blog, LegBranch.org (<https://www.legbranch.org/the-nuclear-option-has-fizzled-again/>). The authors appreciate their interest, comments, and assistance.



WHO WE ARE & WHAT WE DO

Established in 1997 to provide information to incoming White House staff members so that they can hit the ground running, The White House Transition Project includes a group of presidency scholars from across the country who participate in writing essays about past transitions and the inner workings of key White House offices. Since its creation, it has participated in the 2001, 2005, 2009, 2013, 2017, and now the 2021 presidential transitions with the primary goal of streamlining the process and enhancing the understanding of White House operations. WHTP also consults with foreign governments and organizations interested in improving governmental transitions, worldwide.

OTHER BRIEFS IN THIS SERIES

- The “Nuclear Option” has Fizzled...*Again*, The LegBranch.org, blog, January 17, 2020. <http://www.whitehousetransitionproject.org/wp-content/uploads/2020/01/WHTP-TheNuclearOptionFizzles.pdf>
- The Longer You Wait, the Longer It Takes – how to overcome party polarization in appointments politics, January 24, 2020. <http://www.whitehousetransitionproject.org/wp-content/uploads/2020/01/Ba-Schneider-Sullivan-TheLongerYouWaitTheLongerItTakes2.pdf>
- Why does it Take So Long to Confirm Trump’s Appointments? *The Washington Post, Monkey Cage, Analysis*, April 24, 2019. <http://www.whitehousetransitionproject.org/wp-content/uploads/2020/01/WAPO-Why-Does-it-Take-So-Long-to-Confirm-Trump-2019-04-24.pdf>
- Trump is Setting Records in How Few People He Has Appointed — And How Long They Take To Confirm, *The Washington Post, Monkey Cage, Analysis*, January 18, 2018. <http://www.whitehousetransitionproject.org/wp-content/uploads/2020/01/WAPO-Trump-is-Setting-Records-2018-01-18.pdf>

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THE “NUCLEAR OPTION” HAS FIZZLED AGAIN

Heather Ba, Christian Cmeheil-Warn, and Terry Sullivan, *The White House Transition Project*



In 2013, during the 113th Congress, the Senate majority temporarily deployed what some have called the “nuclear option,” purportedly to break a confirmation logjam over President Obama’s judicial nominees. The Senate majority argued the 60-vote threshold embedded in the filibuster rule allowed the minority to obstruct nominations, thereby thwarting the Obama agenda, both of which would otherwise receive majority support. So the majority exempted judicial from the filibuster, ultimately reducing the numbers needed for confirmation to a simple majority. Later, in 2019, during the current, 116th Congress, the Senate majority revived the same rule change ostensibly to accomplish the same objective in the face of the same minority obstruction.¹ This time, though, the two parties reversed roles.

So, how has deploying the nuclear option worked out? Simply put, it made things worse. Here’s how we can tell...

¹Burgess Everett, “Republicans Trigger ‘nuclear option’ to Speed Trump Nominees,” *Politico*, April 3, 2019: <https://www.politico.com/story/2019/04/03/senate-republicans-trigger-nuclear-option-to-speed-trump-nominees-1253118>.

Analyzing the Nuclear Option

We analyzed all relevant judicial nominations by Presidents Obama and Trump.² To evaluate the rule change, we considered deliberations in all four stages of the appointments process, two in the Executive branch and two in the Senate. In the executive, the president's staff first identifies potential nominees and then investigates their qualifications. In the Senate, committees also vet nominees and then the full Senate disposes of them via a floor vote. As it turns out, for the last half a century at least, the Senate has confirmed all nominees brought to a floor vote. Failed nominations usually result when nominees drop into "limbo," languishing in committee or on the Senate's calendar. For the primary analysis, we do not consider nominations in limbo, though most likely they will have experienced excessively long deliberations because when the congressional session ends, the Senate returns these remaining nominations to the President under its Rule 31 (§5; §6).

We divide the president's remaining nominations into three groups:

1. Nominations reported from committee and confirmed before the nuclear option (11/21/2013 for the Obama nominations and April 14, 2019 for the Trump nominations)
2. Nominations reported from committee but not confirmed before the nuclear option
3. Nominations reported from committee entirely after the nuclear option

We focus on comparing groups 1 and 3, because those favoring the nuclear option would suggest that the length of deliberations in both the Senate committee stage and the final floor vote should be shorter for group 3 than group 1.

Table 1 presents our results, with Figures 1 and 2. First, during both presidencies, deploying the nuclear option simply failed to shorten deliberations. After deploying the nuclear option, Senate committees took two days *longer* on average to consider Obama's nominees and nearly 20 days *longer* for Trump's. Though the increased delay for Obama nominees does not statistically differ from zero, the dramatic lengthening of deliberations for Trump nominees after deployment, from 72.7 to 92.2 days, does amount to a statistically significant deterioration ($t = -2.7$, $df = 200.6$, $p\text{-value} = 0.010$).

The pattern for floor deliberations after deployment also follows this pattern. For Obama's nominees, the final floor deliberations took 12 days *longer* after deployment, a significant change for the worse ($t = -1.96$, $df = 92.02$, $p\text{-value} = 0.052$). For Trump's nominees, even though the waiting times for a floor vote decreased by 9 days, this change is not statistically significant.

In neither presidency did the nuclear option shorten the overall length of the Senate process. Instead, deploying the nuclear option actually lengthened delays by an additional 10 days for each president.

Table 1. Pace of Senate Deliberations for Judicial Nominees

Group	#Nominees*				Length of Senate Stage (in days)					
	Committee & Floor				Committee		Floor Vote		Senate Total	
	Obama	Trump	Obama	Trump	Obama	Trump	Obama	Trump	Obama	Trump
1. Before Deployment	43 & 43	103 & 103	68.8	72.7	61.6	93.7	130.4	166.4		
2. Transition Period	8 & 8	43 & 43	131.0	25.0	90.5	119.8	221.5	134.8		
3. After Deployment	101 & 84	100 & 47	70.8	92.2	73.8	84.4	144.6	176.6		

Source: Compiled and calculated by authors, data from congress.gov.

Notes: *The sample sizes for group 3 differ in the committee and floor stages because we exclude (rather than treat as failures) those nominees the Senate majority leaves to languish in committee or on its calendar.

How We Explain the Fizzle

In April of last year, we speculated based on our research that deploying the nuclear option would likely have little effect. We reached this conclusion because our and others' research have described an appointments process that is shaped by more than the polarization used to justify the deployment of the nuclear option.³ Of course, polarization could plausibly explain how the nuclear option fizzled: its deployment merely encouraged a

² For President Trump, the data included all nominations in his first term. For President Obama, we included all nominations in the 113th Congress.

³ Heather Ba and Terry Sullivan, 2019, "Why Does it Take So Long to Confirm Trump's Appointments? The Senate 'went nuclear' — but that won't speed things up much," *The Washington Post — Analysis*, (April 24).

more committed minority to redouble its obstruction. That polarization itself would only motivate a partisan solution, in turn only worsening partisanship not repairing it, should itself recommend a search for other forces in appointments politics that, in turn, would suggest effective, non-partisan repairs.

In particular, our research examines the effects of presidential planning and executive management. This tack has promise because the executive identification and vetting stages constitute the longest parts of the appointments process; on average, taking four times longer than the two Senate stages. That fact alone suggests that to deploy the nuclear option to the just last and shortest Senate stage would likely have no effect on those parts that make up the bulk of the process. Indeed, deploying an ill-targeted reform in this way might only make things far worse.

Instead, our research focuses on the complications posed by an otherwise ineffective executive process. Specifically, we have considered the role of presidential transition planning, stabilizing personnel management, the timing of nominations, and the degree of seemingly non-partisan responsibilities associated with a particular nomination. All of these seem to affect deliberations.

When presidents do not identify quality nominees, vet them properly, and send them to the Senate in a timely manner, their nominations can languish either because the Senators or the public discovers their flaws, or because Senators turn their attention to more productive legislative activities. By contrast, with effective management and good planning, the executive can develop a proper candidate pool that Senators can feel comfortable moving along.

Figure 1. Boxplots of Senate Processing Times for Trump's Judicial Nominations

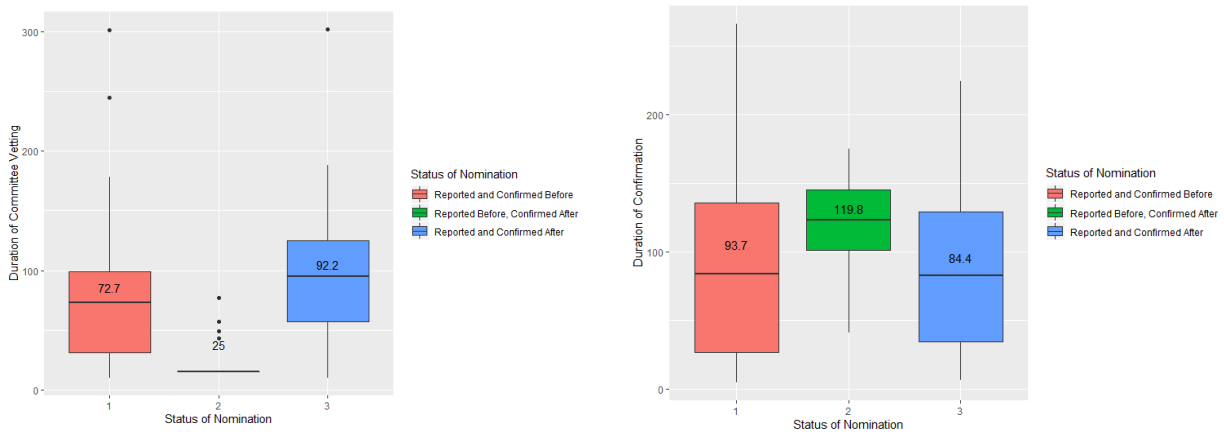
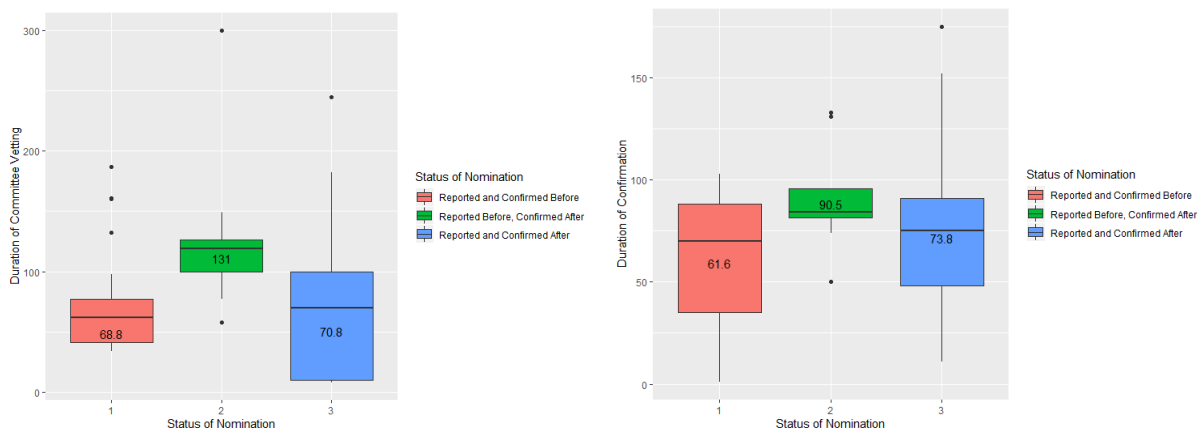


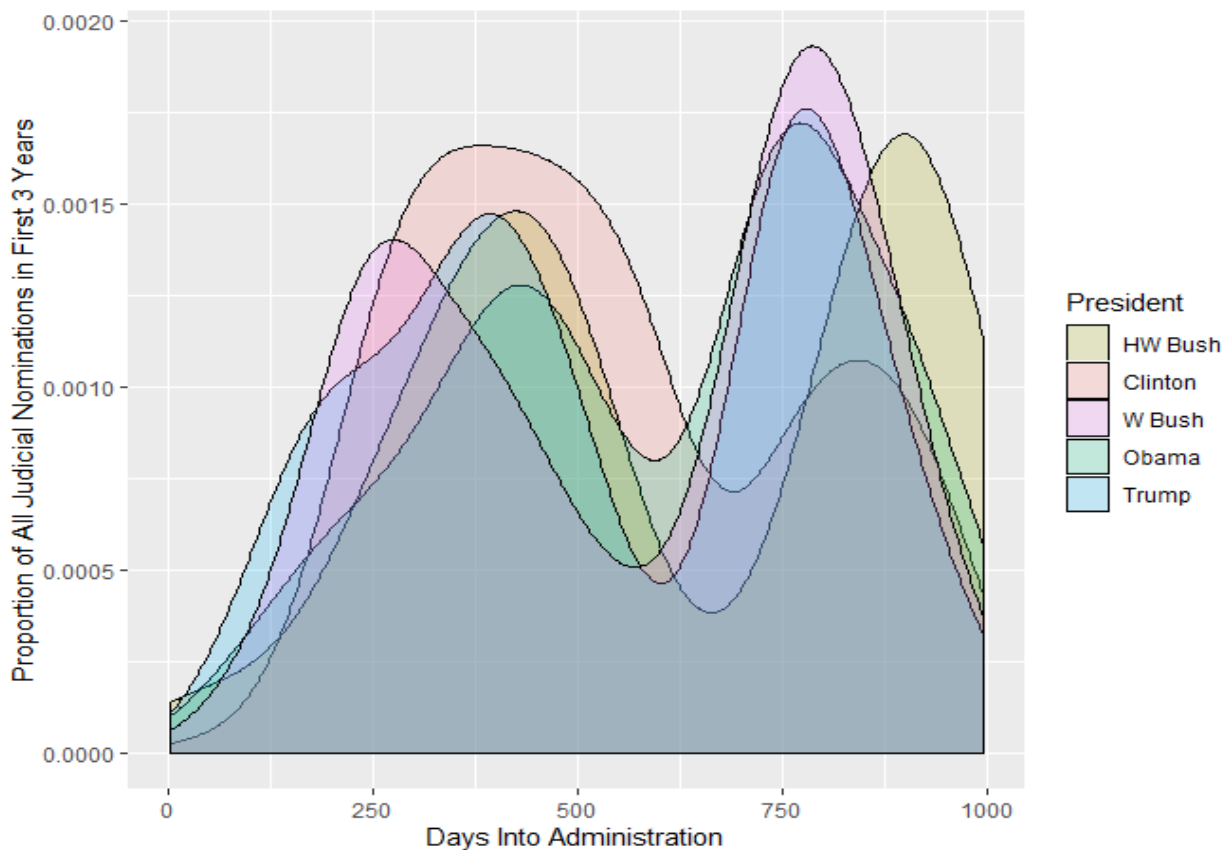
Figure 2. Boxplots of Senate Processing Times for Obama's Judicial Nominations (2nd Term)



The experience of the last three presidential administrations illustrate the effect of executive management on appointments politics. George W. Bush appointed a dedicated transition planning team during the campaign, far in advance of the election. The team used its early start to create a new electronic application system for appointments, which built a database of applicants and their qualifications. Because of this planning, the Bush transition team successfully named its critical White House staff a full eleven days earlier than the typical presidential transition putting it in a position to take advantage of its plans. As a result, the Bush White House took 199 days on average, from the date of the election, to identify and vet nominations, including those for the judiciary (see Figure 3), a full 60 days less than his predecessors had or his successors would.

Following Bush's example, Barack Obama had a largely successful transition effort, but his transition team focused on two major policy challenges rather than appointments. It tackled a large economic stimulus package to address the 2008 financial crisis and it passed the controversial Affordable Care Act. Both commitments left the administration with very little attention and political capital to expend on securing Republican support for appointments.⁴ Magnifying this lack of attention, President-elect Obama placed appointments in the hands of a staff who didn't want the job, who came on board late, and who quit almost immediately. The Obama personnel operation stumbled through its early days and would not really recover.

Figure 3. Histogram of Executive Vetting and Identification Duration for the Past Five Administrations



Donald Trump came to his personnel problems even more quickly than had Obama, firing the entire transition team three days after the election. After the massacre, the personnel team that Trump put in place had no experience with staffing or previous plans: of the seven senior staff, only one had any previous experience with appointments and she took on a limited, technical role. Subsequent to this poor beginning and probably because of it, several of Trump's judicial nominations produced revealing flaws accompanied by considerable, negative press coverage.⁵ While he has nominated roughly the same number of judicial nominees as his

⁴ See <https://www.rollcall.com/news/congress/unsuitable-before-the-election-trump-gets-obamas-judges-on-the-bench>

⁵ See <http://nymag.com/intelligencer/2019/10/pitlyk-is-trumps-latest-unqualified-judicial-nominee.html> and <https://www.nytimes.com/2019/10/30/us/trump-appeals-court-nominees.html>.

predecessors (submitting 229), President Trump has withdrawn 4 judicial nominees during consideration and failed to resubmit another 28 nominations after the Senate used its rules to return them to him. By comparison, this rate of difficulties surpassed even Obama's by a factor of four.

Deploying a nuclear option may have seemed like the only strategy available to Senate leaders. But, because the nuclear option aggravated polarization and addressed none of the executive management issues that created the delays in the first place, no surprise that it has proven so ineffective. We suggest that deploying the nuclear option has failed because it simply didn't address the responsibilities of effective leaders — planning, structuring agendas, making accommodations in those agendas, and scheduling — that would create the context in which Senators might pursue or avoid opportunism to develop their own political leverage. Our initial skepticism about the effectiveness of the nuclear option was rooted in this understanding of appointments politics. So far, it seems our hunch was correct.

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Policy Recommendations to Muffle Partisanship in Appointment Politics

The White House Transition Project has an extensive research program on the causes and effects of appointments politics. It utilizes data on tens of thousands of presidential nominees over the last forty years, covering the modern presidential appointments process established by changes in government ethics requirements beginning in 1978. This analysis uses these data, well-established models of appointment politics found in the standard literatures of political science and economics as well as a range of models unique to The White House Transition Project's researchers. This analysis has been used by the National Commission on Reform of the Federal Appointments Process and by both the Senate bi-partisan leadership and the Executive Branch in forming the basis for policy changes under the *Presidential Appointment Efficiency and Streamlining Act of 2011*.

The current research agenda suggests the following policy recommendations:

- a) Establish permanent confirmation staffs on every Senate authorization committee.
- b) Increase authorization for the Executive to hire more temporary investigators and to publish earlier the full listing of vacant presidential positions.
- c) Increase authorization for the US Office of Government Ethics to hire more auditing staff.
- d) Require the Senate to expand its outreach to the national presidential campaigns prior to the election.
- e) Authorize the creation of an Office of Presidential Personnel Management, including a permanent professional support staff managed by three presidential appointees (PA) and one Director (PAS).