

The Collision of Institutional Power and Constitutional Obligations: The Use of Blue Slips in the Judicial Confirmation Process

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Abstract

In recent years, judicial nominations to lower federal courts have been blocked privately by negative blue slips returned by home state senators. We examine the conditions under which senators return these negative blue slips and whether judicial qualifications can mitigate the possible negative effects of ideological distance. We discover two results. First, consistent with existing work, ideology plays a strong role in blue slipping. Second, and more important, we find that nominee qualifications mitigate ideological extremism--but only for district court nominees. That is, while past presidents could nominate well-credentialed ideologues to the circuit courts of appeals and see them confirmed, today's presidents cannot. In short, if presidents nominate ideologues--even those who are well qualified--to circuit courts, we will continue to observe lengthy vacancies and bitter nomination struggles between the president and Congress over those important courts.

Former Supreme Court Justice Louis Brandeis once stated about government: “Sunlight is said to be the best of disinfectants” (Brandeis 1913). While few would argue with the normative premise behind Brandeis's comment, many consequential policy decisions occur in private. Perhaps nowhere is the deviation from transparency-in-government more profound than in nomination politics, where the Senate's most unique *institutional* power (to defeat measures via obstruction) intersects with its most unique *constitutional* power (advice and consent) and can thwart the goals of nominating presidents. Senators can employ anonymous holds to block judicial nominations from the chamber floor (*No Names, Please* 2010), they can filibuster to prevent nominees from receiving up or down votes, and they can discretely veto a judicial nomination by returning a negative “blue slip” to the Judiciary Committee Chair. Put plainly, while transparency may be a virtue, the processing of judicial nominations is often furtive, and scholars have begun to take notice of the effects that may attach to the secretive--and often obstructive--measures used in it (see e.g., Binder 2007; Koger 2010).

The consequences of these anonymous obstructive tactics can be profound. In his 2010 year-end report on the federal judiciary, Chief Justice Roberts called on both parties to work together to resolve the “persistent problem of filling judicial vacancies” (Liptak 2010, Roberts 2010). The Chief Justice argued that understaffing at the judiciary burdened federal judges with “extraordinary caseloads” and that there was an “urgent need for the political branches to find a long-term solution to this recurring problem” (Roberts 2010). Democratic obstruction of judicial nominees during the Bush administration led then-majority party Republicans to threaten drastic changes in the chambers’ rules (Binder, Madonna and Smith 2007; Koger 2008; Wawro and Schickler 2006). And it led to considerable frustration within the Bush administration.

We connect the literature on judicial nomination politics with the burgeoning literature on Senate obstruction and ask the following question: Under what conditions do senators return negative blue slips to block or delay the president's judicial nominations? We argue that as senators become increasingly distant ideologically from presidents, they are more likely to employ negative blue slips. Perhaps more importantly, though, we discover that this proclivity is exacerbated when the nominee is perceived as less qualified. That is, whereas presidents in the past could get away with nominating judicial ideologues who were well qualified—they could use legal credentials to prop up district court and circuit court nominees who were ideologically distant from senators—today's presidents cannot. Qualifications only appear to mitigate the negative effect of ideology among district court nominees, and not among the more powerful circuit courts of appeals. This finding represents a shift in nomination politics and shows that nominations for circuit court positions have become more contentious. While the limited time period of available data constrains our ability to make broad generalizations, we are nevertheless led to believe that if presidents continue to nominate ideologues—even those who are well qualified—to circuit courts, we will continue to observe lengthy vacancies and bitter nomination struggles to those important courts.

In what follows, we begin by providing background on obstruction in the Senate through filibusters, holds, and blue slips. Focusing, then, on blue slips more specifically, we theorize conditions under which senators might return negative blue slips (or refuse to return them at all) in judicial nominations and thereby obstruct the president's judicial nominations. We next explain our data, present our statistical model, and discuss our results. We conclude with a discussion about the future of judicial nominations. Put plainly, presidents can no longer nominate strong, but well credentialed, ideologues to the circuit court, with the hopes that their

nominees' qualifications will carry the day. The senate, instead, has taken on more power in the appointment process and made it more difficult for modern presidents to stack the circuit courts. This is a major change in the modern nomination process with consequences that are unclear for executives seeking control over legal policy.

Obstruction in the Modern Senate: Filibusters, Holds, and Blue Slips

Since the latter half of the twentieth century, senators have increasingly used their institutional tools to obstruct Senate business, block disfavored legislation, and slow up the president's nominations (Binder and Smith 1997; Koger 2010; Wawro and Schickler 2006). Scholars have noted that the increasing use of obstructive tactics coincided with growth in the size and scope of the federal government. As the size of the executive and legal branches grew, along with the workload of the Senate, so too did the number of measures obstructed. Why senators increasingly used these tools---especially as the amount of Senate business increases---seems obvious: they could exact concessions from time-starved party leaders and presidents.

For example, with the threat of obstruction constantly hanging over the head of the Senate majority leader, the leader must balance legislative priorities with time. Thus, for much of the business that gets scheduled in the Senate, the process is a consensual one in which the majority and minority party leaders forge unanimous consent agreements (Ainsworth and Flathman 1995; Smith and Flathman 1989). Bills or nominations that are not granted unanimous consent agreements are frequently not considered on the chamber floor. When party leaders cannot corral their members they do not move the bill to the floor. The tenuous nature of scheduling thus provides significant leverage to each individual senator. And when it comes to nomination politics, those same concerns affect the president's nominees.

To be sure, the Senate's rules allow a supermajority of the chamber to proceed to a vote on an obstructed measure through the cloture process. Still, such a process is time-consuming and generates significant opportunity costs. A cloture petition must lie over for two calendar days before it is voted on. Then, an additional 30 hours of debate and amending activity can occur before a final vote is taken on the bill or nomination. The Senate simply lacks the time to move cloture on every obstructed bill or nomination. Indeed, as if to underscore the problems facing Senate leaders---and highlighting the power of individual senators---much of the obstruction we *observe* is merely the tip of the iceberg, representing only a small slice of the possible obstruction that occurs outside public view. That is, the threat of obstruction often keeps legislation off the floor, making it remarkably difficult to measure just how much obstruction actually exists. When Senate leaders alter legislation in response to threatened obstruction or obstruction outside public view, they frequently escape our attention.¹

Among the many institutional tools available to senators, a few, which arise from the chamber's lack of a simple-majoritarian rule for ending debate, stand out, especially to presidents on the wrong end of them. Manifest filibusters tend to get discussed the most, but holds and blue slips are also a function of this unlimited debate power. We examine each of these powers but focus primarily on the blue slip, and its role in judicial nominations.

The filibuster allows an individual or a group of senators to obstruct or block a measure that enjoys the support of a chamber majority. The term “filibuster” is perhaps most frequently associated with stories of Southern senators in the mid-20th century delivering lengthy, round-the-clock speeches against Presidents Kennedy’s and Johnson’s civil rights legislation. In these

¹ Determining whether or not a successful filibuster has taken place is almost entirely arbitrary. While some scholars define a filibuster as an outright attempt to defeat a bill (generally by not allowing a final passage vote), others will count attempts to delay the vote or extract concessions as filibustering. Both perspectives require some subjective judgment about what constitutes legitimate debate.

episodes, senators attempted to kill bills by preventing final passage votes on them. Because there was no formal method to limit an individuals' ability to debate a measure by a simple majority, senators would seek to consume so much time on the Senate floor that the session would expire.

The hold, also a function of the unlimited debate power, is a request by a senator to her party leader to delay floor action on a bill or nomination. When a senator seeks to place a hold on a measure or a nomination, he essentially notifies his party's leader of his intent to object to the measure or nomination when or if it is brought to the Senate floor.² While it is ultimately still up to the majority leader to determine whether to honor a hold, the failure to do so can have far-reaching implications for the calendar, the majority's ability to conduct business, and for the president's ability to get his legislation through the Congress. As Oleszek (2008) points out, a majority leader that ignores a hold might "precipitate objections to unanimous consent agreements and filibusters" and thereby stall action on important agenda items.

The blue slip, essentially a more formal version of a hold, is an institutional tool senators use to support or oppose judicial nominees.³ A blue slip is a tool that home state senators can use to support or oppose a federal judicial nominee to a position in their state. Each blue slip provides the name of the nominee, the name of the senator, and a request that the senator provide the Judiciary Committee Chair with information on the nominee. More specifically, when the

² Generally, this is conveyed privately to the party leader. On several occasions, senators have sought to alter the anonymous hold procedure. A 2007 change in the Senate's rules had required senators to publicize any holds issued after six legislative days (provided a member objected) (Oleszek 2008). Another more recent effort occurred on January 26, 2011, when the chamber adopted Senate Resolution 28. The resolution established a standing order requiring members to publicize any objections to unanimous consent agreements (Kucinich and Brady 2011).

³ The blue slip carries with it different norms than filibusters or holds, but the procedural roots are largely the same. It applies only to nominations for lower court judgeships, U.S. Attorneys, and U.S. Marshals (Sollenberger 2003). We focus only the blue slip in relation to judicial nominees. However, the minority party had bypassed this rule by cycling the hold through several members.

Senate receives the president's nomination to the judicial vacancy, the nomination is referred to the Judiciary Committee. The committee counsel, in turn, delivers a “blue slip”---a blue slip of paper---to the nominee's two home state senators.⁴ Unlike the norm of senatorial courtesy, the blue slip is not limited to home state senators of the president's party. All home state senators have blue slip rights that they employ to support or oppose judicial nominees to lower federal courts.

Upon receiving the blue slip, a senator has three options: She may return the blue slip to the Chair with a positive recommendation; she may return it with a negative recommendation; or she may fail to return it at all. When a senator returns a blue slip to the Judiciary Chair with a positive recommendation, she shows that she will not hold it up (Binder 2007). On the other hand, if she returns a negative blue slip or fails to return it, she shows opposition to the nomination. An unreturned blue slip traditionally has been treated the same as a returned negative slip. Just how this blue slip treatment affects the nomination depends on the Judiciary Chair and political context.⁵

The effects of a negative blue slip have varied dramatically between 1913--when the first blue slip appeared (Binder 2007, Sollenberger 2010)--and today.⁶ Chairs initially did not treat

⁴ Identifying the home state senators is generally an easy calculus. Federal district court boundaries always reside within the political boundaries of a state. And, while federal circuits span multiple states, a norm has emerged in which the judiciary committee sends blue slips to the senators where the retiring circuit court judge lived (Sollenberger 2003). While there is sometimes controversy over which state has “rights” to a seat, the normal practice is to fill the position with a nominee who hails from the same state as the retiree.

⁵ While the Judiciary Chair enjoys a significant amount of autonomy, it is the Majority Leader who makes scheduling decisions and can use this power to influence the chair and, possibly replace him. Consider Senator Harry Reid's (D-NV) decision to allow Arlen Specter (D-PA) to claim the Judiciary Chairmanship after Specter switched parties, ahead of Dick Durbin (D-IL) and Charles Schumer (D-NY).

⁶ During its early years, blue slips were simply information-gathering tools Senate Judiciary Committee Chairs used to evaluate nominees and the predicted opposition to that nominee (Binder 2007). A “Senator's negative assessment of a nominee was meant to express to the committee his views on the nominee so that the chairman would be better prepared to deal with the review of the nomination” (Sollenberger 2003, 9).

blue slips as dispositive. Rather, the Chair used the blue slip to determine how much resistance to expect from home state senators regarding a nominee. When Senator Eastland took over as Judiciary Chair (1956-1978), he significantly changed blue slipping policy. During his tenure, a negative blue slip or unreturned blue slip from a single home state senator blocked any further action on the nomination. Why Eastland changed blue slipping policy is unclear, though racial politics likely had something to do with it, as Eastland could use committee rules to block pro-civil rights nominees from reaching the bench (Sollenberger 2010, 130). While later Judiciary Chairs would also alter their treatment of negative blue slips depending on political context, a single blue slip continues to impose a strong and negative effect on any nomination's chance of success. As such, senators today use blue slips “as a means to defeat, not merely delay, a nominee; and perhaps prevent the nomination from being made in the first place” (Denning 2001, 87).⁷

When a single home state senator returns a negative blue slip, the effects are often dramatic. For example, Senator Barbara Boxer's (D-CA) threat to withhold her blue slip had the president nominated Christopher Cox (R-CA) to the liberal Ninth Circuit was enough to lead Cox to withdraw his name for consideration (Denning 2001). Other nominees endured similar fates.

Just as we know little about obstruction more broadly, we know little about the conditions under which senators employ the blue slip to oppose judicial nominees. The anonymity of this and other pre-floor dilatory tactics has made comprehensive empirical analysis difficult. That is not to say that we know nothing about blue slips. On the contrary, a handful of well-executed studies shed light on these powers. Consider, for example, (Binder 2007), who

⁷ For example, between 1979 and 1981, Ted Kennedy (D-MA) used his power as Judiciary Chair to alter blue slip policy and make it easier for President Carter to install more women, minorities, and liberals on the bench.

analyzes Senate Judiciary Committee archival records to determine when the Senate began using blue slips. Binder's findings suggest that blue slips arose as a means of reducing uncertainty about the fate of judicial nominees in an era before the Senate could invoke cloture stop a filibuster.

Using a different approach to examine the effects of blue slips, Slotnick (1980) interviewed ten senators in 1980, just after Senator Ted Kennedy's (D-MA) modification of blue slip policy, to determine their opinion on the institutional practice.⁸ Denning (2001, 2002) briefly examines the constitutionality of blue slips, and suggests reforms to the appointment process.⁹ Sollenberger (2010) analyzes how different Judiciary Chairs have treated blue slips across time and political contexts. Steigerwalt (2010) examined newspaper articles that addressed senators' negative blue slips for circuit court nominations between 1985 and 2006. She examined the published incidents (i.e. those in which a senator publicly claimed credit for the obstruction) in which senators used their blue slips to block or delay a nomination. Steigerwalt shows how, as nominations proceed through different stages of the nomination process, different actors can intervene to influence outcomes. Finally, Black, Madonna, and Owens (2011) examine the conditions under which senators exercise their blue slipping privileges, finding that senators who are ideologically distant from the president are more likely to return negative blue slips.

⁸ Kennedy altered blue slip policy to strip politically powerful senators (i.e. southern conservatives) from blocking such nominations (Sollenberger 2003). When a home state senator failed to return a blue slip, Kennedy allowed the Judiciary Committee rather than the home state senator to decide whether to hold a hearing on a nomination.

⁹ Other studies touch briefly on blue slips as they investigate broader phenomena. For example, Binder and Maltzman (2004) find that presidents, particularly in times of divided government, take more time to seek out judicial nominees who are acceptable to ideologically distant blue slip senators, though they do not examine whether those senators employed their blue slips negatively. Scherer (2005) examines how interest group mobilization affects nomination politics generally, and how the blue slip relates to senators' needs to use tools necessary to influence outcomes.

While all of these studies tell us important information about the blue slip, they do not directly address the question the two questions we ask here: (1) Among all the possible judicial nominees that could be blue slipped, when do modern senators actually employ negative blue slips; and (2) How do judicial qualifications influence the behavior of blue-slipping senators?¹⁰ We seek to build off these important works and improve our understanding of blue slips, of Senate obstruction, and of the role of qualifications among nominees to lower federal courts.

A Theory of Blue Slip Behavior

Following the existing literature on nominations politics, we argue that senatorial ideology *and* the perceived qualifications of the nominee will influence a senator's decision to return a negative or positive blue slip. Both features, we believe, combine to influence blue slip behavior. A host of studies show that ideological considerations strongly influence the behavior of senators and presidents during the nomination process. When determining whom to nominate, presidents consider the ideology of pivotal members of the Senate. As one of President Bush's staffers stated in 2001: "It doesn't do the president any good to send up nominees who are on suicide missions. We have to be sensitive to the winds that blow in the Senate, which is evenly divided... We need to be sure we're doing the right thing politically and philosophically" (Binder 2009, 77). Similarly, Binder (2009) show that presidents take longer to fill lower court vacancies when facing ideologically distant blue slip senators, and less time to fill them when they enjoy home state senators of their own party. Nemacheck (2007) illustrates that when presidents make Supreme Court nominations, they follow either an informational strategy or a political strategy, depending on the composition of the Senate. Moraski and Shipan (1999) and, later, Johnson and

¹⁰ While Black, Madonna, and Owens (2011) speak to the ideological use of blue slips, it tells us nothing about the mitigating role of qualifications in the blue slipping decision. In other words, their findings cannot tell us whether modern presidents can get away with nominating well-credentialed but "extreme" judges to the lower federal courts.

Roberts (2004) further show that the president's selection turns on the identity of relevant legislative pivots.

On the senatorial side, numerous studies highlight the importance of ideology in a senator's decision to support or oppose a nominee. Binder and Maltzman (2002) and Martinek, Kemper and Van Winkle (2002) show that political and ideological considerations lead to confirmation delay. Binder (2009) show that nominees to federal circuit courts are less likely to be confirmed when their home state senator is ideologically distant from the president. And, Cameron, Cover and Segal (1990) demonstrate that ideology and nominee qualifications combine to influence a senator's confirmation vote (see also Epstein and Segal 2005). We take these studies to suggest that senators will employ their blue slip privileges in an ideological fashion. As senators become more distant ideologically from the president, they will be more likely to return negative blue slips. That is:

Policy Agreement Hypothesis: As the ideological distance between a senator and the president increases, the senator will be increasingly likely to return a negative blue slip.

Despite the high levels of attention given to the role of ideology in the nomination process, we believe that nominee qualifications should also influence member decisions. In a number of instances, senators justified their decisions to oppose a nomination on the grounds the nominee was not sufficiently qualified. Perhaps the most famous example of this was the defeat of President Nixon's Supreme Court nominee, G. Harrold Carswell. Responding to concerns about Carswell's record, Senator Roman Hruska (R-NE) was famously stated that: "Even if he is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they...?" (Epstein and Segal 2005, 66). Harriet Miers, too, saw her chances of becoming a justice disappear after serious concerns arose over her lack of judicial experience.

This list, of course, is not limited to Supreme Court nominees. Consider Michael Wallace's nomination to the Fifth Circuit. The American Bar Association determined, based on Wallace's previous experience on the Legal Service Corporation, that he displayed a lack of judicial temperament. As such, the ABA held that Wallace was not qualified to serve. Shortly thereafter, Wallace withdrew his nomination. Janice Rogers Brown, too, saw her nomination to the D.C. Circuit stall, and then nearly evaporate after the ABA rated her as barely qualified. Additionally, empirical evidence further supports the argument that nominee qualifications are important (Martinek, Kemper and Van Winkle 2002; Epstein and Segal 2005; Scherer 2008).

We likewise believe that perceived nominee qualifications will influence senators' blue slip behavior. When a senator perceives the nominee to be more qualified, she will be more likely to return a positive blue slip. Conversely, when the senator perceives the nominee to be less qualified, she will be more likely to return a negative blue slip.

Perceived Qualifications Hypothesis: A senator will be increasingly likely to return a negative blue slip when the nominee appears less qualified for the bench.

We also believe that senators will be more likely to return negative blue slips for circuit court nominations because of those courts' abilities to make important legal policy. “The [federal] circuit courts play by far the greatest legal policy-making role in the United States judicial system” (Cross 2007, 2). Circuit courts wield tremendous power because they rule on nearly every issue before the federal judiciary and are rarely audited by the Supreme Court. According to the Administrative Office of the United States Courts, in 2008, the circuit courts of appeals disposed of 29,608 cases after oral hearings or submission on briefs, and a decade earlier in 1997, they terminated 25,840 such cases.¹¹ And, the Supreme Court rarely reviews circuit

¹¹ This number reflects cases terminated on the merits after oral hearings or submission on briefs. See <http://www.uscourts.gov/judbususc/judbus.html>. Table S-2.

decisions (Kaheny 2008). Indeed, as Brudney (2001) show, the Supreme Court reviewed roughly 0.2% of circuit court decisions in 2000. Because circuit courts rule on many contemporary pressing issues and know that the Supreme Court reviews only a small percentage of their cases (and therefore rarely reverses them), circuit judges have broad discretion (Bowie 2009, Klein and Hume 2003). As such, senators are likely to exercise more caution---and, thus, return more negative blue slips---when examining circuit court nominees.

Circuit Court Hypothesis: A senator will be more likely to return a negative blue slip when the nomination is for a circuit court vacancy.

In addition to their independent effects, it is likely that ideological considerations, nominee qualifications, and court vacancy jointly influence whether senators return a positive or negative blue slip. Indeed, a host of empirical evidence suggests that policy and qualifications combine to influence confirmation votes. Cameron, Cover and Segal (1990) show, for example, that senators vote to confirm ideologically proximate Supreme Court nominees, even when the nominee is considered to be poorly qualified. Conversely, they will vote to confirm ideologically distant nominees when they have impeccable credentials (see also Epstein, Lindstadt, Segal and Westerland 2006).

At the same time, given the private nature of blue slips, the mitigating effect of qualifications may not rear its head. That is, whereas public discussion over nominees inevitably contains frequent references to the nominee's qualifications—who could possibly refuse to confirm someone qualified for the job?—the same public pressure to support a qualified but ideologically distant nominee does not exist in private. Indeed, privately obstructing a qualified ideologue would seem to be an *effective* strategy for opposing party senators. Rather than having to defend publicly their opposition to a well-qualified nominee on ideological grounds, they can

simply obstruct the nomination with the hopes that it never sees the public light of day. Killing the nomination in the cradle saves them from having to defend their opposition on ideological grounds. And this dynamic is likely to be most important for nominations to the circuit courts of appeals. Thus, we expect the following:

The Conditional Effect of Qualifications Hypothesis: A nominee's perceived qualifications will condition the effect of policy disagreement for district court nominations but not circuit court nominations

We further control for a number of additional factors that might influence senators to return negative blue slips. We first control for the amount of time left in the session. We expect that threats of obstruction will be more credible---and effective---later in each session, making the blue slip a more attractive option during this time period (see, e.g. Koger 2010, Wawro and Schickler 2006). Next, we examine whether senators used the blue slip to block the president's female nominees so as to limit their future potential for higher office. During the Bush administration, conservative commentators often argued that Senate Democrats sought to block these nominees. As one such commentator argued, "Senate Democrats oppose qualified conservative...women because they are loathe to place such judges one step from the Supreme Court."¹²

If these stories are correct, we would expect to see senators using blue slips against women nominated by Bush. In a similar vein, we might expect to see senators blocking young nominees. Finally, we control for the popularity of the president. It is well documented, for example, that popular presidents are more likely to enjoy legislative success (Binder and Maltzman 2004; Bond and Fleisher 1992; Light 1998). Senators may be reticent to stand up

¹² <http://www.intellectualconservative.com/article2786.html>.

publicly to popular presidents. We might therefore expect that when public support for the president is high, senators will turn to the (less public) blue slip to oppose nominees. When, however, the president's public approval is low, senators can publicly oppose the president with tools other than the private blue slip.

Data and Measures

To determine the conditions under which senators employ their blue slips, we analyzed every nomination to the federal district and circuit courts between the 107th through 110th congresses (inclusive)---the only recent congresses where blue slipping data are available. In 2001, Chairman Leahy and Ranking Member Hatch agreed to make blue slips public regardless of who was Chair or which party controlled the Senate (Sollenberger 2010, 130). Despite this agreement, however, the Committee made public on the Department of Justice Office of Legal Policy website only the blue slips during the 107th and 108th congresses.¹³ Thankfully, Sollenberger (2010) was able to procure blue slip data from the 109th and 110th congresses privately from the Senate Judiciary Committee.¹⁴ Our unit of analysis is the senator's blue slip per nomination---that is, the senator's blue slip treatment of every nomination. Our dependent variable is coded as 1 if a senator returned a negative blue slip or failed to return one at all.¹⁵ Just over 10% of nominations in our dataset yielded a negative blue slip.

We code our independent variables in the following manner: *Senator's Ideological Distance from President* is the absolute value of the ideological difference between the senator and the nominating president, using the first dimension Poole and Rosenthal common space

¹³ See <http://www.justice.gov/archive/index-olp.html>.

¹⁴ Sollenberger (2010, 130) states that the data from the 109th and 100th congresses “were provided to [him] by committee staff.”

¹⁵ During the time period of our sample, Judiciary Chairs treated the failure to return a blue slip the same as returning a negative one.

scores (Poole and Rosenthal 1997, 2007).¹⁶ Our measure of perceived judicial qualifications comes from the American Bar Association Standing Committee on the Federal Judiciary's ratings for each nominee.¹⁷ The ABA Standing Committee evaluates prospective judicial nominees and issues summaries as to those nominees' qualifications for serving on the federal judiciary. The committee evaluates nominees' professional competence, integrity, and judicial temperament.

After an analysis, the ABA provides a single rating to identify the nominee's quality. During the time period under study the ABA provided three ratings---well-qualified, qualified, or not qualified. Each nominee could receive either a unanimous or split committee rating. For example, some nominees, like Michael W. McConnell, received a unanimous well-qualified rating. Others, like Michael Wallace, received a unanimous not qualified vote. Other nominees observed split votes. Consider Glen Conrad, who was nominated to be a circuit court judge on the Fourth Circuit. A majority of the ABA committee rated him as well qualified while a minority rated him qualified. We took advantage of these committee splits to create an ordinal ranking of nominee qualifications. That is, we created a scale from 1-7 in which we ranked a nominee's qualifications. A *Nominee ABA Rating* of 1 means that a nominee was unanimously not qualified, while a rating of 7 was unanimously well qualified. Each rating in between reflected a gradient of the vote.

To examine the interactive relationship between the senator's distance from the president and the nominee's qualifications, we created an interactive term which is *Ideological Distance from President* multiplied by *Nominee ABA Rating*. To code *Circuit Court Nomination*, we relied

¹⁶ The results we report below are unchanged if we measure ideological distance using the first dimension of DW-Nominate instead.

¹⁷ See ABA Standing Committee on the Federal Judiciary website: <http://www.abanet.org/scfedjud/>.

on the blue slip data provided by the Judiciary Committee. If those data stated that the nomination was for a circuit court, the variable receives a 1; 0 otherwise. In order to examine the conditional relationship between the nominee's qualifications and the court vacancy, we interacted *Nominee ABA Rating* and *Circuit Court Nomination*.

To determine *Female Nominee*, we reviewed the Federal Judicial Center Biographical Directory. The vast majority of data could be found in this database. Where those data were not available, we turned both to the nominee's personal resume, which can be found at the Office of Legal Policy website, or to contemporary journalistic accounts of the nominee's characteristics. To determine *Nominee's Age*, we simply determined the year in which the nominee was born and subtracted that year from the year in which the president nominated her. We code *Days Until Session Ends* as the number of days between when the president makes his nomination and the end of the Senate's session.¹⁸ To determine the *President's Popularity at Nomination*, we visited Gallup's website and determined the president's popularity at the time of the nomination.¹⁹

Methods and Results

Since our dependent variable examines the dichotomous outcome whether a senator returns a negative blue slip, we estimate a probit regression model and test for statistical significance using robust standard errors clustered on the nominee. Parameter estimates for our model are reported in Table 1.

¹⁸ We would prefer to count the number of days between when the blue slip was sent to the senator and the end of the session, but those data are not available for every congress in our data. Moreover, the data that do state when the blue slip was sent provide only "approximate" dates. At any rate, our data show that the modal number of days between a nomination and a blue slip sent out was 8 calendar days. The median number of calendar days was 11, with a standard deviation of 11. Thus, while the use of the nomination date is not perfect, we believe it nevertheless captures the broader dynamic we are after.

¹⁹ The Gallup popularity data can be found at: <http://www.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx>.

[Insert Table 1 about Here]

As both the statistical significance and the sign of an interaction term can change across a variable's range (Berry, DeMeritt and Esarey 2010; Kam and Franzese 2007), the standard table of parameter estimates is of little use for interpreting our main hypothesis of interest. Thus, we follow the recommendation of King, Tomz and Wittenberg (2000) and Brambor, Clark and Golder (2006) and turn to predicted probabilities to examine our results. Figures 1 and 2 illustrate the relationship between ideological distance on the x-axis and the predicted probability a senator returns a negative blue slip on the y-axis. The solid line represents a hypothetical nominee who receives a low rating from the ABA. The dashed line, by contrast, shows a nominee with a high ABA rating.²⁰ Figure 1 shows our results if the nomination is to a district court and Figure 2 shows the same results for a circuit court nomination.

[Insert Figure 1 About Here]

Starting with a district court nominee (Figure 1), we find that as the ideological distance between a senator and the president increases, so too does the likelihood of observing a negative blue slip. Additionally, for low to moderate levels of ideological distance, our results suggest little difference between nominees who are deemed to be highly qualified versus those who are not. For higher levels of ideological distance, however, qualifications can attenuate the impact of ideology. More specifically, when the ideological distance is 0.80 or above---roughly the 65th percentile value in our data---we find that highly qualified district court nominees are significantly less likely to observe a negative blue slip than are their less qualified counterparts. When ideology is at its 75th percentile value (approximately 0.84), for example, we estimate that

²⁰ More specifically, we define low as being a value of 3 on our 7-point scale. This represents approximately the 10th percentile. For the high ABA value we use the maximum in our data (i.e., a score of 7). Because of the high frequency with which nominees receive the maximum (in our data nearly 44% of nominees earned such a score), this value represents roughly the 65th percentile in our data.

a nominee with a low ABA rating is roughly three times as likely to receive a negative blue slip than a nominee with a high ABA rating (i.e., 0.27 [low ABA] versus 0.09 [high ABA]). As we note in the figure, this difference is statistically significant for 37 percent of the observations in our data.

To contextualize these results, consider President Bush's nomination of David Bunning to the Eastern District of Kentucky. Bunning received a particularly low ABA rating: a majority of the committee determined him to be not qualified, while only a minority deemed him to be qualified. Despite his low qualifications, neither senator from Kentucky opposed his nomination. Perhaps it was because they both were ideologically close to the president.²¹ Recall, further, Michael Wallace, who received a unanimous not qualified rating. Neither senator from Mississippi exercised his blue slip to block the nomination, likely because they agreed ideologically with the nomination. On the other hand, recall Frederick W. Rohlfing's nomination to the federal district court of Hawaii. Senator Daniel Akaka's (D-HI) negative blue slip (along with that of his colleague and fellow Democrat, Senator Inouye), put the brakes on the nomination.

Was it coincidence that Akaka was ideologically distant from President Bush? We think not. Was it happenstance that Akaka exercised his blue slip after Rohlfing received a “not qualified” rating from the ABA? Again, probably not. Indeed, if we consider the nomination of J. Michael Seabright, whose nomination succeeded Rohlfing's, we can observe the power of perceived qualifications. Unlike Rohlfing, Seabright received a strong ABA vote: a substantial majority of the ABA committee found him to be well qualified while a minority determined him to be qualified. Akaka's ideological distance from the president, of course, remained constant.

²¹ Or, perhaps it was because Bunning was the son of Senator Jim Bunning (R-KY).

Akaka and Inouye returned positive blue slips for Seabright who was thereafter confirmed by the full Senate. Put plainly, our results suggest that presidents can insulate their district court nominees from a negative blue slip by picking nominees with strong credentials.

[Insert Figure 2 About Here]

We next turn to Figure 2 to determine whether a similar strategy would work for circuit court nominees. Note, initially, that we observe the same general relationship as shown in the panel addressing district court nominees: increasing ideological distance from the president leads senators to return negative blue slips. Unlike district court nominees, however, *circuit court nominees cannot be saved by better qualifications*. That is, for all values of ideological distance, circuit court nominees with high ABA ratings are no less likely to receive a negative blue slip than those with low ABA ratings. This finding represents a sizable shift in nomination politics and shows that nominations over circuit court positions have become much more contentious than in past years. In other words, the modern senate has become much more active in the “consent” stage for circuit court nominees. No longer willing to cede power to presidents who nominate well qualified ideologues, modern senators will use their private institutional powers to kill such nominations in their infancy. Better to do it there than to defend later their opposition to the nominee on ideological grounds.

Our controls performed partially as expected. *Days Until Session Ends* is negative and statistically significant, meaning that senators are less likely to employ the blue slip the farther out they are from the end of the session. When the session is just in its infancy, we estimate a 1% chance of observing a negative blue slip. By contrast, in the closing days of the session, that

likelihood jumps to around 7%.²² We found no relationship between nominee age or sex and the decision to return a negative blue slip; nor did we find any evidence to suggest that presidential popularity influences blue slipping.

To be sure, we recognize that ideology and qualifications are not the only factors at play. Presidents often nominate individuals after compromising with senators. Steigerwalt's (2010) important study highlights a number of instances in which senators used their blue slips because the president failed to consult sufficiently with them. Clearly, these dynamics affect the process.

Take, for example, President Bush's nomination of Helene White. White was originally nominated to the Sixth Circuit by President Clinton, despite Clinton's promise to then-Michigan Senator Spencer Abraham that he would not do so. In response, Abraham exercised his blue slip privileges to block White nomination, which thus languished for years in the Senate. After Bush became president, Democratic Senators Levin and Stabenow used their blue slips in retaliation to block Bush's nominations. Eventually, they persuaded Bush to nominate White to the circuit court and, in exchange, released their stranglehold on other nominees (Thomas 2008).

This example highlights the weakness with using an empirical model such as ours. Yet, we nevertheless wonder whether presidents consult less with senators for ideological reasons. It must be more than coincidental that Bush allegedly failed to consult sufficiently with Senators Boxer (1.21 distance from the president), Feinstein (0.99), Levin (1.14), and Stabenow (1.05), senators among the most ideologically distant from Bush. In other words, while we do not believe that our model fully captures all the dynamics that influence blue slip behavior--- we

²² We use the 356 days (early) and 32 days (late) for this counterfactual. This represents the 95th and 5th percentile in our data, respectively.

believe these unmodeled variables are highly likely to be correlated with ideological considerations.

Discussion

The constitution directs the senate to advise the president on judicial nominations and directs that nominees will only be confirmed after the Senate's consent. Over the years, the senate has created a series of institutional tools that senators can employ during this process. In recent years, filibuster, holds, and blue slips all have taken on increased importance, and have generated heightened concern. Yet, because they are often so secretive, these obstructive tactics have received comparatively little empirical examination.

Our data, while limited in time, provide interesting insights into judicial nominations---the intersection of the Senate's institutional powers with its constitutional obligations. First, we observe that senators are more likely to return negative blue slips when they are ideologically distant from the president. Second, we find that senators are more likely to return negative blue slips when judicial nominees are perceived as less qualified. For presidents, this means that they should be very careful when selecting nominees to positions with home state senators who are ideologically distant and, when so doing, they should take aims to ensure that those nominees are perceived as well qualified as possible.

Third, and most important, we find that the president's ability to save extreme nominees is limited. Qualifications will only resurrect ideologically extreme nominees to district court vacancies. When it comes to confirming circuit court nominees, the senate has taken back some of its institutional power. Senators will use their private institutional powers to block qualified but extreme nominees. Doing so allows them to block potentially "dangerous" judges, all in the privacy of institutional process. Thus, as presidents nominate judges to circuit court vacancies,

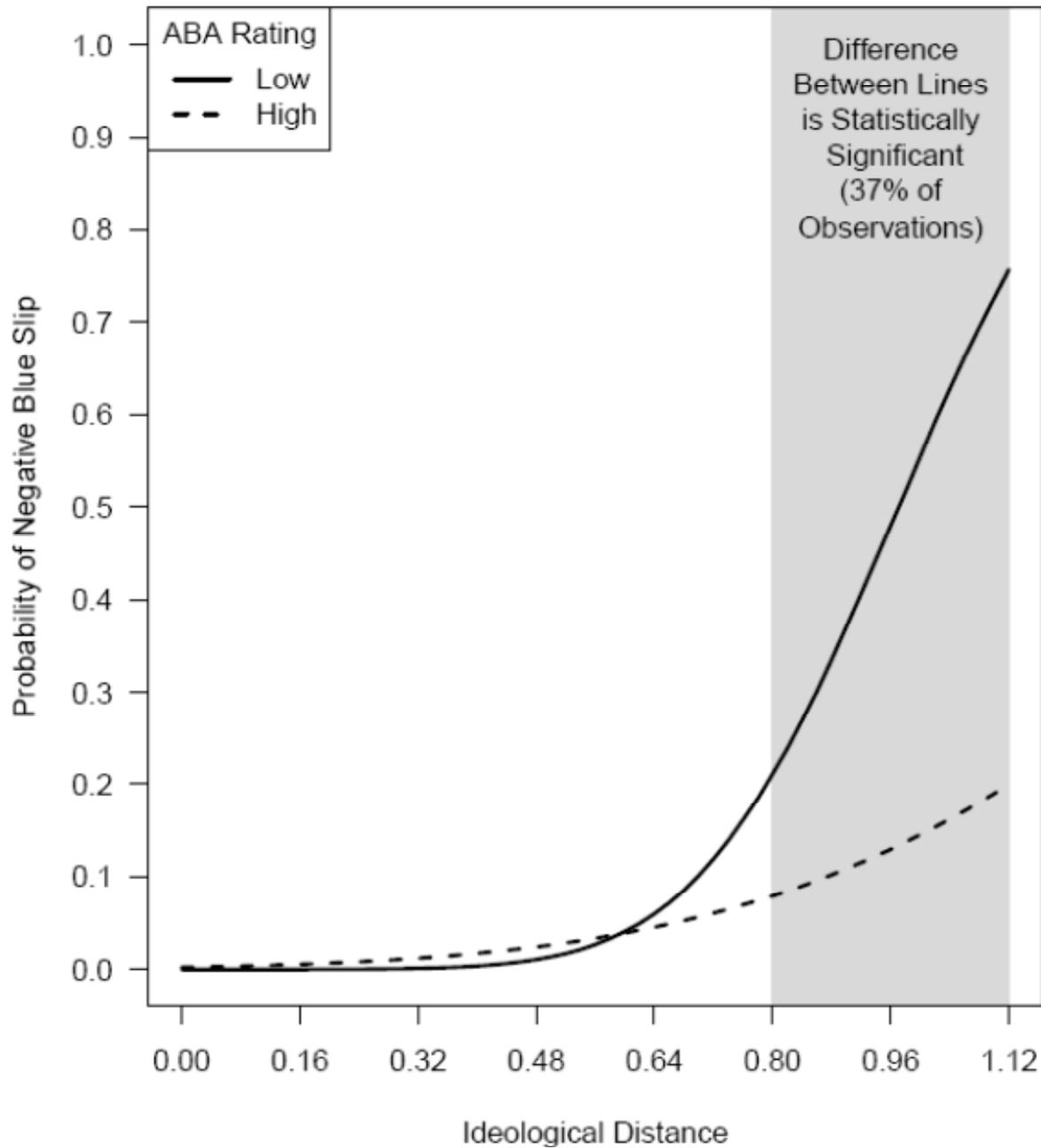
they face significant threats of obstruction from home state senators who oppose them. Unless presidents nominate less ideological judges, or the Senate changes its rules on obstruction, we will continue to observe bitter partisan fights and lengthy delays over circuit court nominations.

Table 1 – Probit Regression Model of a Senator’s Decision to Return a Negative Blue Slip

<u>Variables</u>	
Ideological Distance	6.869* (2.555)
ABA Rating	0.430 (0.285)
Circuit Court	-0.057 (6.962)
ABA Rating * Ideology	-0.727 (0.374)
ABA Rating * Circuit Court	-0.349 (1.044)
ABA Rating * Circuit Court * Ideology	0.297 (1.330)
Days Until End of Session	-0.002* 0.001
Female Nominee	-0.301 (0.236)
Nominee’s Age	-0.011 (0.017)
Presidential Popularity	-0.009 (0.007)
Constant	-4.293 (1.674)
Observations	836
log <i>L</i>	-143.639

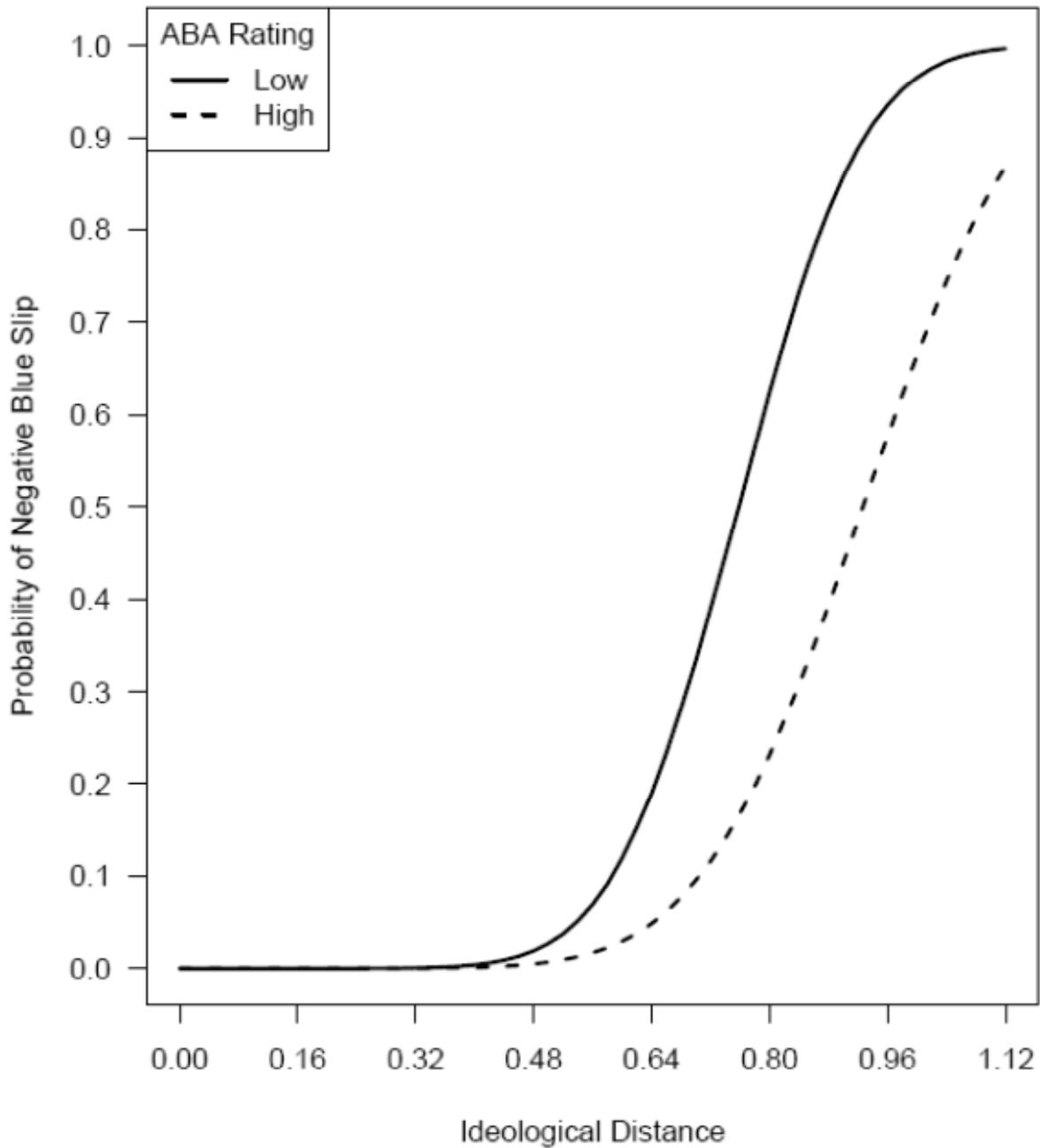
* $p < 0.05$ (two-tailed test). Probit regression model of a senator's decision to return to the Senate Judiciary Chair a negative blue slip for a judicial nominee, 107th-110th congresses. Standard errors (reported in parentheses) are clustered on each of the 352 unique nominees in our data.

Figure 1: Probability of a Negative Blue Slip for District Court Nominee



Note: Probability a senator returns a negative blue slip conditional on the ideological distance between the senator and president (x-axis), the nominee's qualifications (dashed versus solid lines), and the court to which the nominee has been nominated (left versus right panels). The gray region denotes that the difference between the line types is statistically significant ($p < 0.05$, two-tailed test).

Figure 2: Probability of a Negative Blue Slip for Circuit Court Nominee



Note: Probability a senator returns a negative blue slip conditional on the ideological distance between the senator and president (x-axis), the nominee's qualifications (dashed versus solid lines), and the court to which the nominee has been nominated (left versus right panels). The gray region denotes that the difference between the line types is statistically significant ($p < 0.05$, two-tailed test).

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