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## **Ideology, Qualifications, and Covert Senate Obstruction of Federal Court Nominations**

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# IDEOLOGY, QUALIFICATIONS, AND COVERT SENATE OBSTRUCTION OF FEDERAL COURT NOMINATIONS

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*Scholars, policy makers, and journalists have bemoaned the emphasis on ideology over qualifications and party over performance in the judicial appointment process. Though, for years, the acrimony between the two parties and between the Senate and President remained limited to appointments to the United States Supreme Court, the modern era of judicial appointments has seen the so-called “appointments rigor mortis” spread throughout all levels of judicial appointments. A host of studies have examined the causes and consequences of the growing acrimony and obstruction of lower federal court appointments, but few rely on archival data and empirical evidence to examine the underlying friction between the parties and the two branches.*

*In a unique study, the authors examine archival data to determine the conditions under which Senators obstruct judicial nominations to lower federal courts. More specifically, the authors examine one form of Senate obstruction—the blue slip—and find that Senators use their blue slips to block ideologically distant nominees as well as unqualified nominees. More importantly, however, the authors find that among nominations to federal circuit courts, Senators block highly qualified nominees who are ideologically distant from them just as often as they block unqualified nominees who are ideologically distant from them. That is, stellar qualifications do not appear to mitigate the negative effects of ideological distance. The fact that blue slips occur in private, away from public view, allows Senators to block nominees entirely on ideological grounds without fear of indi-*

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*vidualized public retribution. Senators, in short, have taken an aggressive role in blocking highly qualified nominees who would otherwise make significant—but opposing—policy and who might one day become credible nominees to the Supreme Court were their nominations to move forward. By killing these nominations in the cradle, and outside the public view, Senators can block or delay the confirmation of judges with whom they disagree ideologically.*

*The authors point out that policy makers and scholars who seek to reform the judicial appointment process must therefore be very clear about their goals. If a reform's goal is to minimize the role of Senate ideology in the appointment process, then proposals that insulate the process from the public eye are likely to backfire. For, as the data show, Senators take advantage of insulation to achieve ideological goals. On the other hand, if a reform's goal is to maximize the role of Senate ideology—perhaps to offset the President's first mover advantage or to recognize and directly address the fact that courts are policy making bodies—then proposals that insulate the process from the public eye are likely to accomplish that goal.*

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## I. INTRODUCTION

Scholars, policy makers, and journalists on both the left and right diagnose the modern federal judicial appointment process as a “mess” that is “broken” and in dire need of repair.<sup>1</sup> The rancor of the appointment process, which, at one time was limited to Supreme Court nominations, has spread to lower federal court nominations.<sup>2</sup> Senators today appear to reject circuit and district court nominees not because the nominees are unqualified to sit on the bench, but because they are casualties in a broader ideological and political war for control over the judiciary.<sup>3</sup> For example, Senator Dean Heller (R-NV) recently blocked the nomination of Elissa Cadish to the District of Nevada because Cadish claimed earlier in her career—before the Supreme Court decided *District of Columbia v. Heller*<sup>4</sup> and *McDonald v. Chicago*<sup>5</sup>—that she did not believe the Second Amendment granted an individual right to bear arms.<sup>6</sup> Similarly, when George W. Bush took office, Senate Democrats threatened to obstruct many of the President’s otherwise qualified nominees, triggering a showdown between them and Judiciary Committee Chair, Orrin Hatch (R-UT).<sup>7</sup> And this process is likely to become more difficult now that the D.C. Circuit has curtailed the President’s recess appointment power—an important though controversial means of circumventing appointment gridlock.<sup>8</sup> In short, many people argue, the judicial appointment

1. See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 5 (1994); see also MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* 6 (1994) (offering a contemporaneous and somewhat different account of the process); John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL’Y 181, 227 (2003); John M. Walker, Jr., *The Unfortunate Politicization of Judicial Confirmation Hearings*, THE ATLANTIC, Jul. 9, 2012, available at <http://www.theatlantic.com/national/archive/2012/07/the-unfortunate-politicization-of-judicial-confirmation-hearings/259445/>.

2. See, e.g., AMY STEIGERWALT, *BATTLE OVER THE BENCH: SENATORS, INTEREST GROUPS, AND LOWER COURT CONFIRMATIONS* 5–8 (2010) (noting the shift from “patronage-based to policy-based lower court appointments” as well as the increasingly political involvement of Senators and interest groups even in lower court nominations and confirmations).

3. See generally Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251, 253 tbl.1, 254 tbl.2 (2003).

4. 554 U.S. 570 (2008).

5. 561 U.S. 3025 (2010).

6. See ALLIANCE FOR JUSTICE, *THE STATE OF THE JUDICIARY: JUDICIAL SELECTION DURING THE REMAINDER OF PRESIDENT OBAMA’S FIRST TERM* 7–8 (2012), available at <http://www.afj.org/wp-content/uploads/2013/09/state-of-the-judiciary-may-2012.pdf>.

7. HERMAN SCHWARTZ, *RIGHT WING JUSTICE: THE CONSERVATIVE CAMPAIGN TO TAKE OVER THE COURTS* 199–200 (2004).

8. See *Canning v. NLRB*, 705 F.3d 490, 514 (D.C. Cir. 2013) (holding that the recess appointment power in U.S. CONST., art. 2, § 2, cl. 3 applies only in formal intersession recesses of Congress); see also Ryan C. Black et al., *Adding Recess Appointments to the President’s “Tool Chest” of Unilateral*

process is headed toward absurdity because Senators sacrifice qualifications for ideological purity.

Seeking to “repair” the judicial appointment process, judges, policy makers and academics have proposed a series of reforms to the appointments process. Some of these reforms are broader than others. For example, Chief Justice John Roberts consistently, but in a general sense, prods Congress to come up with bipartisan solutions to staff the over-worked and under-resourced lower courts.<sup>9</sup> Others have proposed more specific reforms to the selection process itself, so as to heighten the role of qualifications and lessen the importance of ideology.<sup>10</sup> Scholars like Stephen Choi and Mitu Gulati propose a tournament of judges to determine the most qualified judges for elevation to the Supreme Court.<sup>11</sup> Similarly, Calabresi and Lindgren suggest term limits for Supreme Court Justices so as to clear the poisonous atmosphere that now pervades all judicial appointments.<sup>12</sup> Stephen Carter and others promote making parts of the process more private to remove the incentives for Senators to grandstand.<sup>13</sup> And observers of the United States Senate have recently argued the best way to “repair” the judicial appointment process is to alter the Senate’s rules governing the filibuster.<sup>14</sup>

Our goal here is not to take sides in the ongoing normative debate over whether the appointment process requires mending; nor is it to offer reform solutions. Rather, our goals are more modest. We seek to accomplish three objectives in this Article. First, we want to examine broadly the conditions under which Senators work *behind the scenes* to obstruct nominations before they receive up or down votes on the Senate floor. Second, we seek to analyze the role of qualifications in the modern judicial appointment process, specifically in the behind-the-scenes, pre-Judiciary Committee hearing phase. We aim to determine whether a Senator who is ideologically distant from a nominee will obstruct her because of their ideological differences, or whether the Senator allows the

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*Powers*, 60 POL. RES. Q. 645, 650–53 (2007) (empirically showing the first-mover advantage created by a robust recess appointments power).

9. JOHN G. ROBERTS, JR., 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5–8 (2011), available at <http://www.supremecourt.gov/publicinfo/yearend/2010year-endreport.pdf>; see also RUSSELL WHEELER & SARAH BINDER, BROOKINGS INSTITUTION, DO JUDICIAL EMERGENCIES MATTER? NOMINATION AND CONFIRMATION DELAY DURING THE 111TH CONGRESS 8 (2011), available at [http://www.brookings.edu/~media/research/files/papers/2011/2/16%20judicial%20emergencies%20wheeler%20binder/0216\\_judicial\\_emergencies\\_wheeler\\_binder.pdf](http://www.brookings.edu/~media/research/files/papers/2011/2/16%20judicial%20emergencies%20wheeler%20binder/0216_judicial_emergencies_wheeler_binder.pdf).

10. See discussion *infra* Part I.B.

11. Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CALIF. L. REV. 299, 300 (2004).

12. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y. 769, 771–72 (2006).

13. CARTER, *supra* note 1, at 21.

14. In both the 112th and 113th Congresses, Senate Democrats sponsored proposals that would have drastically curtailed the ability of individual Senators to obstruct or filibuster legislative proposals and nominations. In both cases, the chamber spurned these efforts, and in their place, adopted minor proposals. Jackie Kucinich & Jessica Brady, *Changes to Senate Rules Fall Short of Drastic Proposals*, ROLL CALL (Jan. 27, 2011, 8:14PM), <http://www.rollcall.com/news/-202907-1.html>; see also Niels Lesniewski, *Filibuster Changes Get Senate Approval*, ROLL CALL, (Jan. 24, 2013, 7:53PM), [http://www.rollcall.com/news/filibuster\\_changes\\_get\\_senate\\_approval-221072-1.html](http://www.rollcall.com/news/filibuster_changes_get_senate_approval-221072-1.html).

well-qualified nominee to move forward in the process. Finally, we seek to provide empirical evidence to scholars and policy makers as they debate whether to reform the process and, if so, how.

We employ an original dataset containing private archival data on Senate obstruction. More specifically, we examine one type of Senate obstruction—the blue slip. The two U.S. Senators from a lower federal court nominee’s home state have the power to return positive or negative blue slips to the Senate Judiciary Committee chair.<sup>15</sup> A positive blue slip shows that the home state Senator approves (or does not oppose) the nomination, but a negative blue slip can slow or kill it.<sup>16</sup> Until recently, scholars had limited access to blue slipping data (and, for that matter, precious little data on any private obstructive tactics). They could examine obstructive behavior only if the obstructing Senator made his or her behavior known publicly.<sup>17</sup> By taking advantage of recently released blue slipping data, we determine how Senators work behind the scenes to obstruct nominations privately, how qualifications influence Senate obstruction, and how reforms might (or might not) proceed successfully.

The data lead to three important discoveries. First, nominee ideology and qualifications both independently influence whether Senators blue slip lower federal court nominees, with ideology playing a stronger role. All else being equal, a Senator is more likely to blue slip a lower federal court nominee who is ideologically distant from her than an ideologically close nominee. Similarly, a Senator is more likely to blue slip an unqualified nominee than a qualified one. Yet, these independent results mask a more important, interactive, finding: stellar qualifications do not protect circuit court nominees who are ideologically distant from Senators.

Senators blue slip ideologically distant lower court nominees even when they are highly qualified. And the fact that the blue slipping process occurs in private—away from the glare of public review—would seem to exacerbate the Senators’ ideological proclivities. Thus, an important distinction arises between circuit court nominees and Supreme Court nominees. Because there are no home-state Senators for Supreme Court nominations, no Senators can exercise a blue slip. Therefore, unless Senators secure a filibuster, they cannot kill the nomination in the cradle. On the other hand, Senators can obstruct ideologically extreme nominees to the circuit courts in an effort to prevent their nominations from ever moving toward a committee or floor vote.

Finally, the data speak to the consequences of reform proposals. Before advocating for certain reforms, reformers must spell out their goals. If their goals are to minimize the effects of ideology, they must address the Senate’s institutional rules that allow for private obstruction. On the other hand, if they seek to maximize the role of ideology (or

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15. STEIGERWALT, *supra* note 2, at 52–53.

16. *Id.*

17. *Id.* at 54–55.

simply to retain the status quo), they must leave these institutional powers alone, and may even seek to make the process, as one scholar put it, more “opaque.”<sup>18</sup>

This Article unfolds in five parts. Part II discusses the modern judicial appointment process and various calls for its reform. Part III discusses three main obstructive tactics (i.e., filibusters, holds, and blue slips) Senators use to block or delay judicial nominations. The bulk of this discussion, for reasons explained below, focuses on blue slips. Part IV lays out our theory of the conditions under which Senators blue slip lower federal court nominations. Part V describes our data and explanatory model. Part VI presents the results of our multivariate model. Finally, the conclusion analyzes how our results support and challenge existing reform proposals.

## II. NORMATIVE CLAIMS, EMPIRICAL OBSERVATIONS, AND PROPOSED REFORMS: THE MODERN JUDICIAL APPOINTMENT PROCESS

Does the modern appointment process focus on ideology at the expense of judicial qualifications? According to some scholars, the answer is yes, and the process desperately needs reform. Senators today focus on judges’ policy backgrounds and their perceived ideological preferences but pay scant attention to their merit. Without reforming the system, scholars argue, these trends will threaten the independence and legitimacy of the courts.

To provide context to these arguments and what they mean for judges, Senators, and courts, we break this Part into three sections. First, we review the debate over what values *should* motivate the judicial appointment process. Second, we review a subset of reform proposals that seek to repair the appointment process. Third, we evaluate the factors that actually *do* motivate Senators during the judicial appointment process.

### A. *Normative Claims About the Factors that Should Motivate the Judicial Appointment Process*

The Constitution provides that the President will nominate judges to the federal courts but reserves to the Senate the open-ended power to advise and consent.<sup>19</sup> What, exactly, these words allow the Senate to consider is the subject of serious debate. The Senate’s modern interpretation, which exacts serious scrutiny, is highly controversial. As Stephen Carter puts it, “We know that under Article II of the Constitution, the President nominates them and, with the advice and consent of the Sen-

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18. *Id.* at 20–21. *But see* Rafael I. Pardo, *The Utility of Opacity in Judicial Selection*, 64 N.Y.U. ANN. SURV. AM. L. 633, 641 (2009) (arguing that increased opacity in the judicial selection process would yield a less ideological judiciary).

19. U.S. CONST. art. II, § 2, cl. 2.

ate, appoints them. But we are not quite sure what anybody's role is—the President's, the Senate's or the public's."<sup>20</sup>

Any review of the normative debate over the modern judicial nomination and confirmation process must, of course, begin by focusing on the role of ideological considerations. Unfortunately, however, the terms of the debate about ideology remain unclear. After all, how we define ideology matters in how much relevance it should enjoy. For example, some scholars might define ideology to include crass political considerations. Others might define it to include judicial philosophy, which many believe is more legitimate.<sup>21</sup> Certainly in Congress, where rhetorical politicking often trumps candid deliberation, the question of the role of ideology has been persistently obscured. Senator Jeff Sessions (R-AL) draws a distinction between “results-oriented political ideology” and “judicial philosophy,” arguing that Senators should consider only the latter.<sup>22</sup> Sessions stresses that a nominee must understand her “role as a judge,” including her propensity to follow precedent, to set aside political views, and to interpret the law “as it is written.”<sup>23</sup> Lurking just under the surface, of course, is the specter of political ideology.<sup>24</sup> In short, scholars and policy makers have not come to agreement on just what ideology means, and normative discussions in that regard tend to frame up in conventional political manners.

Assuming that the dichotomy between judicial philosophy and political ideology cannot be maintained in practice, can the evaluation of the nominee's ideology be defended as an appropriate consideration? Can Senators legitimately ask judicial nominees how they plan to vote on hot-button political issues like abortion, gay rights, the death penalty, or affirmative action? Or should Senators confine their consideration to factors such as the integrity, character, and qualification of the nominee?

20. CARTER, *supra* note 1, at 14.

21. Dawn E. Johnsen, *Should Ideology Matter in Selecting Federal Judges?: Ground Rules for the Debate*, 26 CARDOZO L. REV. 463, 468–69 (2005).

22. *Judicial Nominations 2001: Should Ideology Matter?: Hearings Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 107th Cong. 5 (2001) [hereinafter *Should Ideology Matter?*] (statement of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary); *see also id.* at 14 (statement of Sen. Jon Kyl, Member, S. Comm. on the Judiciary) (arguing that it is “sheer folly” to consider ideology).

23. *Should Ideology Matter?*, *supra* note 22, at 6. This minimalist understanding of a judge's role is not exhaustive—other Senators might emphasize other components of judicial philosophy writ large, e.g., a pragmatic disposition or even a capacity for empathy. The very choices Senator Sessions makes in describing “judicial philosophy” indicate that the dichotomy he offers might be a false one, or at least a difficult one to maintain. Nevertheless, Dawn Johnsen argues that it is important to maintain the distinction because it is a central part of constitutional discourse and is central to the art of judging: “As law students quickly learn, the Constitution often cannot be interpreted simply by reference to constitutional text. . . . [Federal judges] must resolve difficult legal questions for which a single clear answer does not exist. As President Reagan well understood, judges' legal philosophies, methodologies, and views on particular legal issues greatly affect the lives, liberties, rights, and welfare of Americans and others under their jurisdiction.” Johnsen, *supra* note 21, at 473–74.

24. *The Senate's Role in the Nomination and Confirmation Process: Whose Burden?: Hearings Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 107th Cong. 177 (2001) [hereinafter *Whose Burden?*] (statement of Ronald D. Rotunda, Professor of Law, University of Illinois College of Law).



The debate over these questions can be usefully divided into two opposing schools of thought: the political school and the legalist school.<sup>25</sup> Both schools have flourished in response to the maladies of the confirmation process.

### 1. *The Political School*

Senators and scholars in the political school—the camp that believes it is appropriate to investigate nominee ideology—articulate several arguments to defend the consideration of political ideology. To begin with, they argue that the integrity and accountability of the judicial branch requires the Senate to expose Presidents who seek to pack the courts with political or ideological devotees who will do their bidding.<sup>26</sup> And, to determine whether a nominee is merely a political servant, Senators must probe the nominee’s ideological predispositions.<sup>27</sup> Thus, because Presidents are apt to select extreme nominees who will entrench presidential ideology (especially at the Supreme Court level), Senators should focus their attention on ideology.<sup>28</sup> For example, in the early years of the George W. Bush administration, many Senate Democrats and liberals, still smarting over ideological battles during the Clinton presidency, demanded an opportunity to exercise an ideological veto for what they considered to be extreme nominees.<sup>29</sup>

In recent years, a less partisan “political school” literature developed, one which makes a similar point—that the power and insulation of the federal courts (i.e., the counter majoritarian difficulty) justifies or even requires Senators to inspect nominee ideology so as to provide an *ex ante* check on judicial supremacy.<sup>30</sup> That is, before nominees become

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25. MICHAEL COMISKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* 2 (2004).

26. CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENT PROCESS* 187 (2007).

27. SCHWARTZ, *supra* note 7, at 308 (“Nor is a nominee entitled to a lifetime position on the federal bench just by virtue of being nominated. There must be a record of what the nominee has done and thought so that the Senate can know his beliefs and attitudes.”); *Should Ideology Matter?*, *supra* note 22, at 12 (statement of Sen. Russell D. Feingold, Member, S. Comm. on the Judiciary).

28. EISGRUBER, *supra* note 26, at 187–89.

29. *See, e.g.*, SCHWARTZ, *supra* note 7, at 304–05; Neil A. Lewis, *Democrats Ready for a Judicial Fight*, *N.Y. TIMES*, May 1, 2001, at A16, A9.

30. *See e.g.*, *Whose Burden?*, *supra* note 24, at 165 (statement of Sanford Levinson, Professor of Law, University of Texas Law School); *id.* at 181 (statement of Judith Resnik, Professor of Law, Yale Law School); *id.* at 199 (statement of Mark Tushnet, Professor of Law, Georgetown University Law Center); TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 80 (1999); Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 *U.C. DAVIS L. REV.* 619, 624–28 (2003) (arguing that one of the longstanding problems in constitutional theory—the “counter-majoritarian difficulty”—is in some sense resolved or ameliorated through a robust political appointments process). *See generally* John C. Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 *MICH. L. REV.* 1436 (2000) (reviewing TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* (1999) and DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* (1999) (discussing the arguments for and against consideration of ideology as a check on Presidential power). Of course, this argument implies a sliding scale: the more important the position, the more legitimate it is to consider political ideology. Consider, for instance, former Senator Paul Simon’s testimony that, when it comes to Su-

federal judges with lifetime tenure, salary protection, and other institutional insulation, they must first go through an exacting screening process that removes from consideration those nominees whose tenures as judges would be marked by significant, and minimally controlled, ideological extremism.<sup>31</sup>

But just how far the Senate should go is a difficult question. Professors Laurence Tribe and Cass Sunstein advocate a “balanced” approach wherein Senators should chiefly consider ideology when the nominee would make a court unbalanced in terms of ideology.<sup>32</sup> Others would limit ideological consideration to weeding out nominees who are far out of the mainstream of American values.<sup>33</sup> Whatever the specific recommendation, the overarching logic of these approaches emphasizes that the importance of judicial nominations and the legitimate disagreements that inhere in constitutional decision making mean that Senators and Presidents rightly consider the ideology of nominees.<sup>34</sup>

A more practical reason offered for consideration of ideology is that consideration of ideology is inevitable, and that it is better to acknowledge openly that ideology plays a role in Senators’ votes and judges’ decisions.<sup>35</sup> Openly acknowledging ideology at least holds promise in subjecting Senators to public checks for their behavior, disincentivizing the “gotcha” politics that often stand in for ideological review when a Senator cannot openly acknowledge her ideological objections to the

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preme Court nominations, the calculus is entirely different than it is with respect to lower court nominations, and “whatever is considered by the President properly should be considered by the Senate.” *Whose Burden?*, *supra* note 24, at 136 (statement of Paul Simon, Former Sen.). *But see id.* at 179 (statement of Judith Resnik, Professor of Law, Yale Law School) (arguing that, if anything, circuit court nominees should be subject to more ideological scrutiny than Supreme Court nominees because they are the final say in many more cases).

31. EISGRUBER, *supra* note 26, at 178–85.

32. LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 107 (1985); *Should Ideology Matter?*, *supra* note 22, at 40 (statement of Laurence H. Tribe, Professor of Law, Harvard Law School); *id.* at 60 (statement of Cass R. Sunstein, Professor of Law, University of Chicago Law School). *But see* Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 *YALE L.J.* 1283, 1290 (1986) (reviewing *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* (1985)) (arguing that Tribe’s balance principle is overly narrow).

33. Friedman, *supra* note 32, at 1318 (“The foregoing analysis suggests to me that, in general, the long-run benefit of ideological opposition is too uncertain and too limited to be worth the very substantial costs that it entails. But a Senator should not put ideological considerations totally out of mind. He should satisfy himself that the nominee does not hold views that the Senator regards as so repugnant that he perceives harm merely in giving the nominee the opportunity to air them from the platform of the Supreme Court. If the nominee fails to meet this test, then I believe the balance of costs and benefits swings the other way and the Senator should vote against confirmation.”).

34. Chemerinsky, *supra* note 30, at 627–28; Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 *CARDOZO L. REV.* 579, 631 (2005).

35. *See, e.g.*, GEORGE WATSON & JOHN A. STOOKEY, *SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS* 222 (1995) (“We believe the discontinuity between the expectations and the reality of the nomination process ought to be resolved in favor of accepting that process for what it is—political. Then we need to educate the public about that reality—and its significance—rather than futilely seeking to achieve some apolitical expectation.”); *Should Ideology Matter?*, *supra* note 22, at 2 (statement of Sen. Charles Schumer).

nominee, and generally encouraging candidness in the process.<sup>36</sup> Thus, many have come to see more open ideological consideration of nominees as an answer to the ideological consideration that has been driven underground by the taboo on direct ideological scrutiny.

## 2. *The Legal School*

Still, encouraging Senators to focus on political ideology is a minority position and one that remains in the shadow of the legal school.<sup>37</sup> The legal school offers its own ethical, pragmatic, and constitutional arguments, declaring that the rise of ideological considerations is illegitimate and harmful.<sup>38</sup> First, there is the “catch-22” problem. If Senators ask nominees about their political ideologies—and reject them on those grounds—nominees will simply not answer such questions. But if Senators, in turn, refuse to confirm nominees because of their failure to answer such questions, nominees will be unsure what, exactly, they should or should not say. Or so the argument goes.<sup>39</sup>

More commonly heard is the argument that ideology is irrelevant, or at least significantly less relevant than other factors—such as “work habits,” “intellectual honesty,” “competence,” and “integrity”—to the day-to-day work of a judge.<sup>40</sup> This line of thinking will forever be associated with Chief Justice Roberts’ confirmation analogy between the work of a judge and the work of an umpire, who calls balls and strikes without regard to the affiliation of the batter or pitcher and (presumably) knows the exact contours of the strike zone ahead of time.<sup>41</sup>

Advocates of the legal school also point out that Senatorial consideration of ideology contradicts Alexander Hamilton’s discussion in *The Federalist*. As Doug Kmiec points out, Hamilton emphasized “questions of integrity,” “questions of fitness,” “questions of temperament,” and “questions of fidelity to the rule of law,”<sup>42</sup> all of which preserve a simultaneously “powerful” but “silent” operation of the Senate’s part in the

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36. *Should Ideology Matter?*, *supra* note 22, at 2 (statement of Sen. Charles Schumer); *see also* JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS 8 (1990) (“When [S]enators are given the opportunity to base their opposition to a Supreme Court nomination on non-ideological considerations, they will be inclined to cite those considerations in any public statements on the nomination. Being less universally accepted and therefore more controversial, [S]enators will tend to avoid stating that their opposition is based upon party and ideological considerations when other grounds are present.”).

37. *Whose Burden?*, *supra* note 24, at 116 (statement of Sen. Jeff Sessions).

38. *Id.*

39. *Whose Burden?*, *supra* note 24, at 116–17 (statement of Sen. Jeff Sessions).

40. *Id.* at 138–39 (statement of Sen. Fred Thompson); *id.* at 172 (statement of Ronald D. Rotunda, Professor of Law, University of Illinois College of Law) (“We want fair courts—not liberal courts, not conservative courts, not moderate courts, but fair courts, and by ‘fair,’ I mean we want judges who will call them as they see them, without regard to politics.”).

41. Bruce Weber, *The Deciders: Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at WK1.

42. *Whose Burden?*, *supra* note 24, at 191 (statement of Douglas W. Kmiec, Dean and Professor of Law, Catholic University of America).

process.<sup>43</sup> Hamilton saw little role for ideology, the argument goes, so it is possible that the Framers would have opposed the application of ideological principles, at least as we conceive of them today. Indeed, if ideology prevails over competency-based considerations, we might be “on the way downward to getting a very inferior judiciary”<sup>44</sup> that has lost track of its fundamental function of deciding cases neutrally, professionally, and competently and therefore lacks the prestige and public support necessary to attract the best judges.<sup>45</sup>

The legal school claims, further, to enjoy practical support for its position because, even if ideology is inextricably interwoven with the act of judging, Senators are poor judges of nominee ideology. Judges often “drift” ideologically once they are on the bench, surprising both supporters and opponents.<sup>46</sup> As Ronald Rotunda points out, this is largely because “most candidates for judgeships don’t know what their philosophy is when they start judging and it changes everyday. . . . [W]e want people who learn over time.”<sup>47</sup> And while scholars are beginning to examine whether we can predict which Justices will drift ideologically,<sup>48</sup> it is still very difficult to determine whether a nominee’s ideological preferences will remain stable over time.

43. THE FEDERALIST NO. 76 (Alexander Hamilton). *But see* CARTER, *supra* note 1, at 12 (noting that the language of Art. II, § 2 was initially resisted precisely because of delegates’ “worry that the President might gain the upper hand, particularly with respect to the appointment of judges, thus upsetting the delicate balance of power among the three branches”); COMISKEY, *supra* note 25, at 24–26 (disputing the argument that Hamilton’s *Federalist* argument was inconsistent with the idea of ideological consideration).

44. *Whose Burden?*, *supra* note 24, at 146 (statement of Sen. Orrin Hatch); *see also id.* at 160 (“I think that ideology is a very dangerous ideology to be preaching because if we ever get to a point where liberals vote against conservatives and conservatives vote against liberals in a knee-jerk fashion because we differ in philosophy and ignore the fact that the President has this power of nomination and ignore the credentials of people who are nominated, then I think we are going to have a rough time getting really qualified people to serve in the Federal courts anywhere in this country.”).

45. Choi & Gulati, *supra* note 11, at 301 (“We believe that the present Supreme Court selection system is so abysmal that even choice by lottery might be more productive. We also believe that politics is primarily to blame. The present level of partisan bickering has not only unduly delayed judicial appointments, it has also undermined the public’s confidence in the objectivity of those justices that are ultimately selected.”); Friedman, *supra* note 32, at 1317 (“There is another cost of ideological resistance, more subtle yet more significant, that Tribe never considers. Perceptions of the Court substantially shape the nature of the confirmation process, and history and logic strongly suggest that the relationship also runs the other way. Rarely is public attention focused on the Court as intensely as during a confirmation struggle. Extended debates, both within the Senate and beyond, concerning recent decisions and the political philosophy of a nominee cannot help but diminish the Court’s reputation as an independent institution and impress upon the public—and indeed on the Court itself—a political perception of its role.”); *see also* Steven Lubet, *Confirmation Ethics: President Reagan’s Nominees to the United States Supreme Court*, 13 HARV. J. L. & PUB. POL’Y. 229, 235 (1990) (suggesting that public confidence in the judiciary can be eroded when the confirmation process appears to depend on pledges of future conduct); *Whose Burden?*, *supra* note 24, at 169 (statement of Ronald D. Rotunda, Professor of Law, University of Illinois College of Law) (“I don’t think nominees should make any of these promises. I think that consideration of ideology should not be over the table, under the table, or through the table. It is something that shouldn’t be done.”).

46. Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1486 (2007).

47. *Whose Burden?*, *supra* note 24, at 170 (statement of Ronald D. Rotunda, Professor of Law, University of Illinois College of Law).

48. *See, e.g.*, Ryan J. Owens and Justin P. Wedeking, *Predicting Drift on Politically Insulated Institutions: A Study of Ideological Drift on the United States Supreme Court*, 74 J. POL. 487 (2012).

Moreover, judicial independence is threatened by attempts to pin down nominees' ideologies and to control the ideological predispositions of the federal bench.<sup>49</sup> Indeed, nominees face an ethical issue when confronted with these kinds of questions: if they are confirmed, it is difficult for the judge to appear, let alone be, impartial when real litigants come before her with knowledge of her prejudgment. At stake in the battle between ideology and competency-based considerations is republican constitutionalism:

[P]ersonal integrity, judicial temperament or demeanor, and learning in the law or competence are the primary indicia for eligibility of judicial service, and underlying them all, [*sic*] must be a sincere commitment to abide by the rule of law. Judicial independence from mean spirited or shallow political posturing or inquiry is merited because in this country, citizens are still entitled to believe that lawyers called to the bench—and those receiving the confirmation of the Senate—will allow the prospective application of previously and regularly enacted rules to prevail over arbitrary power, even when they may dislike the rule at issue.<sup>50</sup>

Whether one believes that Senators (and Presidents for that matter) should delve into nominees' ideological preferences depends on their beliefs about how courts should act and how they do act. The political camp espouses a set of goals seeking to highlight ideological aspects of nominations, in part to deal with the reality that modern judges are policy makers and in part to protect against presidential overreach. The legal camp, on the other hand, argues that ideological intrusions by Senators can lead to negative consequences. Consistent with their claims, scholars in both camps (though primarily the legal camp) have generated a number of reform proposals. In what follows, we examine a few.

### B. Proposed Reforms

Though there are a number of reforms offered to “repair” the process, we focus here on a handful.<sup>51</sup> As stated above, many scholars believe that competence ought to be the central criterion in Senate evaluation and therefore have invested a great deal of effort to identify merit objectively and adopt reforms calibrated to emphasize it. Some of the ideas are eccentric—for instance, Lawrence Solum has said that Senators should turn their consideration to the character, or “aretaic virtue,” of

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49. *Whose Burden?*, *supra* note 24, at 193 (statement of Douglas W. Kmiec, Dean and Professor of Law, Catholic University of America).

50. *Id.* at 196.

51. The most serious alternative to ideological considerations is “qualifications” or “merit,” so we focus on these kinds of proposals. See, e.g., WATSON & STOOKEY, *supra* note 35, at 211–19 (reviewing a range of proposals, most of which center on reducing the role of politics and increasing the role of more objective considerations); *Should Ideology Matter?*, *supra* note 22, at 13–14 (statement of Sen. Jon Kyl, Member, S. Comm. on the Judiciary); *id.* at 29–39 (statement of Sen. Orrin Hatch, Member, S. Comm. on the Judiciary).

nominees.<sup>52</sup> Other ideas are familiar and quantifiable, but increasingly criticized: here we have in mind the ABA evaluations that are at the heart of the discussion about qualifications in most real-life nominations.<sup>53</sup> But one of the most straightforward (and novel) efforts is Choi and Gulati's idea of a tournament of judges.<sup>54</sup>

Because modern Presidents routinely nominate sitting lower court judges to higher appellate court positions, Choi and Gulati look to a series of objective indicators of judicial performance—publication rates, citations of opinions by other courts, citations by the Supreme Court, citations by academics, dissent rates, and the speed of disposition of cases—to “make clear (and thereby reduce) the role that politics plays in both the initial process of selecting a candidate and the often highly political Senate confirmation proceedings.”<sup>55</sup> If the President nominates someone who does not rank high under these objective indicators, Senators would be able to see the nominee for what he or she is—an ideological appointee—and summarily reject the nominee.<sup>56</sup> At the same time, Senators who vote against highly qualified nominees might suffer repercussions for acting overtly ideologically.<sup>57</sup> Moreover, delineating a set of objective indicators not only has the benefit of diminishing the role of overtly ideological considerations in the confirmation process,<sup>58</sup> but also incentivizes desirable behavior in the ranks of lower court judges.<sup>59</sup> Though Choi and Gulati are primarily concerned with Supreme Court nominations, their conception of merit or qualifications is nonetheless useful in thinking about the qualities of an ideal nomination and confirmation process. As Shin sums up the logic of the tournament:

taking the Tournament seriously involves a normative conclusion . . . namely, that the top performers in the Tournament make up the set of candidates from which the next appointee should be drawn, such that the nomination of someone from outside this group can be presumed to have been based on illegitimate ideological reasons. If what we want is an adequate defense of this claim, it is just question begging to say that most people hold a view of merit based decision making that precludes relying on ideological considerations.<sup>60</sup>

The tournament might be the most serious alternative to traditional ABA ratings as a measure of merit or qualification. Insofar as ABA ratings are suspect for ideological bias to the point that at least one Presi-

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52. Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659, 673–77 (2005).

53. For a good review of the growing literature on the alleged ideological bias of ABA ratings, see Susan Navarro Smelcer et al., *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees*, 65 POL. RES. Q. 827 (2012).

54. Choi & Gulati, *supra* note 11, at 299.

55. *Id.* at 303–04.

56. *Id.*

57. *Id.*

58. *Id.* at 301–02.

59. *Id.* at 305.

60. Patrick S. Shin, *Judging Merit*, 78 S. Cal. L. Rev. 137, 145 (2005).

dent has declined to use them in nominating candidates,<sup>61</sup> the tournament offers an objective measure of merit or qualification that is purged of any overt ideological bias. While it has clearly not been implemented—and there are practical questions about operationalization that would need to be answered<sup>62</sup>—the basic idea of measuring nominees by objective and widely-available measures has received generally favorable reviews.<sup>63</sup> Few who endorse the general idea that qualifications and merit should play a larger role in the process dismiss the spirit of Choi and Gulati's tournament.<sup>64</sup>

Stephen L. Carter offers another reform alternative centered on clarifying what is meant by competence or ethics. Carter objects to the politicization of the modern confirmation process, arguing that the fact that “we do not hold our glorious confirmation seminars in secluded classrooms” but instead in “brightly lit committee rooms” tends to work out “so badly in practice that one wonders if we should keep up the pretense that we are engaged in any exercise other than trying to fix the results of decisions in advance.”<sup>65</sup> For Carter, the transparency of the ideological consideration of nominees lays bare the fact that our confirmation process threatens, and perhaps is even designed to limit, judicial independence.<sup>66</sup>

But Carter also recognizes that specifying an alternative to the consideration of ideology—one that is more appropriately centered on the nominee's legal acumen and philosophy—is difficult. There is, he argues, a tendency to focus “relentlessly on a nominee's *disqualifications* rather than *qualifications*.”<sup>67</sup> Part of his answer is therefore to shift the burden of persuasion to the supporters of the nominee, thereby taking away the

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61. Robert S. Greenberger, *ABA Loses Major Role in Judge Screening*, WALL ST. J., Mar. 23, 2001, at B8; *see also* Choi & Gulati, *supra* note 11, at 316 (listing objections to the use of ABA evaluations).

62. Ahmed E. Taha, *Information and the Selection of Judges: A Comment on “A Tournament of Judges,”* 32 FLA. ST. U. L. REV. 1401, 1402-03 (2005) (“[W]hen it comes to a tournament, the devil may be in the details. Although Choi and Gulati believe that even a flawed tournament would be better than the current selection process, a seriously flawed ranking system could create undesirable incentives for judges and could actually make the judicial selection process, and the judiciary itself, more political.”).

63. *Id.* at 1402 (“Although I do not believe that the current judicial selection process should be replaced with a tournament, Choi and Gulati's proposal is valuable because it encourages discussion focused on identifying the characteristics of a good judge and how to measure those characteristics. In addition, when refined, such measurements could provide useful information to persons involved in the judicial nomination and confirmation process.”); Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383 (2009) (collecting the myriad methodological critiques of the tournament, adding some additional methodological nuance to the tournament, and defending the idea of the tournament against the most sweeping claims of its critics). The most powerful critiques of the tournament come from those who point out the difficulties in measurement created by the collegiality of decision making on the circuit courts. Taha, *supra* note 62, at 1403-05.

64. One notable exception is Steven Goldberg's argument that very few of the great Supreme Court Justices served as circuit court judges, and that many more of the great Justices served as governors, Senators, attorneys general, and state court judges. Steven Goldberg, *Federal Judges and the Heisman Trophy*, 32 FLA. ST. U. L. REV. 1237, 1237 (2005).

65. CARTER, *supra* note 1, at 87-88.

66. *Id.* at 88.

67. *Id.* at 20.

incentive for Senators to focus on disqualifying factors and freeing Senators to consider qualifying factors.<sup>68</sup> What qualifying factors? While many Senators continue to argue for emphasis on judicial philosophy instead of political ideology, Carter is skeptical of the possibility of discovering a nominee's judicial philosophy through traditional questioning, which is generally designed to elicit responses that give some indication about how the judge will likely rule on important issues.<sup>69</sup> At best, Senators can only hope to use their time with a nominee to get a sense of the "whole person."<sup>70</sup> Specifically, Senators should ask questions designed to gauge whether the nominee is "a person for whom moral choices occasion deep and sustained reflection."<sup>71</sup> In general, Carter's solution implies making Judiciary Committee confirmation hearings considerably more minimalist than they currently are: the "political task in the real world of real interpretive problems is to [fill] the bench not with Justices holding the right constitutional theories but with Justices possessing the right moral instincts."<sup>72</sup> In other words, "allowing public inquiry into the moral vision of the nominee . . . is not the same as allowing public inquiry into the nominee's likely votes."<sup>73</sup> To the extent that Senators have real concerns about the likely votes of the nominee, they would be urged to suppress them and focus only on the nominee's general moral character.

*C. Empirical Observations: What Values Lead Senators to Support or Oppose Judicial Nominees?*

Despite the heat generated from these normative debates, they have produced little empirical light. What factors actually lead Senators to support or oppose judicial nominees? How much does ideology in fact influence Senators' decisions? On this score, the data are fairly clear.<sup>74</sup> Qualifications, ideology, and the interaction of the two explain a significant amount of Senatorial voting on judicial nominations.

Consider, first, the effects of ideology. Is ideology the boogeyman that so many fear? Perhaps. Clearly, Presidents and Senators seek to fill the modern judiciary with ideological allies.<sup>75</sup> For example, Epstein, Segal, Staudt, and Lindstädt find that the ideological distance between a Senator and a nominee has a substantive effect on the probability of a

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68. *Id.* at 159–60.

69. *Id.* at 80–85.

70. *Id.* at 151.

71. *Id.* at 152.

72. *Id.*

73. *Id.* at 114.

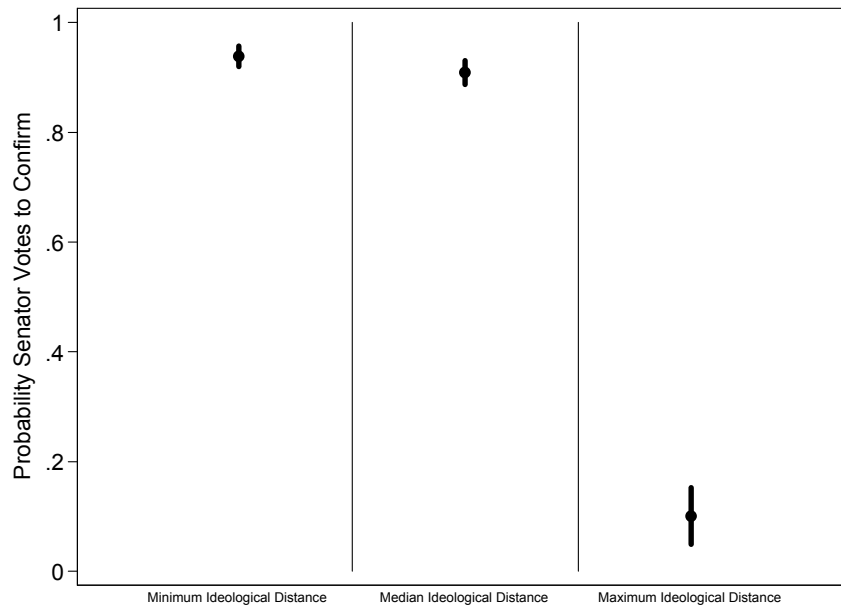
74. See, e.g., Wendy L. Martinek et al., *To Advise and Consent: The Senate and Lower Court Nominations, 1977-1998*, 62 J. POL. SCI. 337, 357–58 (2002).

75. SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 3–4 (1997); STEIGERWALT, *supra* note 2, at 6; see also Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 517–18 (2002) (examining Post-Reconstruction attempts to fill the courts with ideological allies).



positive confirmation vote.<sup>76</sup> If the Senator and nominee are maximally distant ideologically, the probability of a vote to confirm the nominee is a mere 0.235.<sup>77</sup> Yet, when the two are ideologically aligned, the probability that the Senator votes to confirm skyrockets to 0.994, a 323% change.<sup>78</sup> In a similar study, Epstein, Lindstädt, Segal, and Westerland find further support for the role of ideology.<sup>79</sup> Using their data, we graphed the importance of ideology in Figure 1. As the Figure shows, Senators become less likely to cast yea votes for Supreme Court nominees as the ideological distance between the two of them increases. When a Senator and a nominee are ideologically aligned, the Senator has a ninety-four percent chance of voting to confirm the nominee. When the distance drops to the median value in the data, the probability drops to ninety percent. And when the distance increases to the maximum value in the data, the probability drops to a mere ten percent. Clearly, at least when it comes to Senators' votes to confirm Supreme Court nominees, ideology plays a large role.

FIGURE 1: THE EFFECTS OF IDEOLOGICAL DISTANCE BETWEEN A SENATOR AND NOMINEE ON THE SENATOR'S CONFIRMATION VOTE<sup>80</sup>



76. Lee Epstein et al., *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. 1145, 1173 (2005).

77. *Id.* at 1169.

78. *Id.*

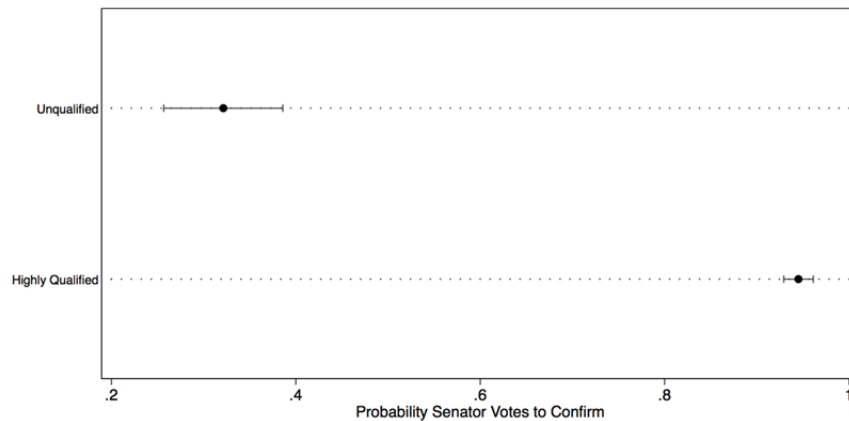
79. Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296, 299–300 (2006).

80. *Id.*

Next, consider the effects of qualifications. A number of studies show that Senators become more likely to vote to confirm nominees as those nominees become increasingly qualified.<sup>81</sup> As Epstein and Segal point out in regards to the Supreme Court, a highly qualified nominee can expect to receive, on average, forty-five more votes than a nominee rated universally unqualified.<sup>82</sup>

When we replicate the findings of Epstein, Lindstädt, Segal, and Westerland in Figure 2, we can see the effects of qualifications on Senators' votes. When a nominee is highly qualified for a Supreme Court vacancy, a Senator has a ninety-five percent chance of voting to confirm. On the other hand, when the nominee is deemed universally unqualified, that probability sinks to thirty-two percent.

FIGURE 2: .THE INFLUENCE OF NOMINEE QUALIFICATIONS ON A SENATOR'S CONFIRMATION VOTE<sup>83</sup>



The joint effect of ideology and qualifications matters, to be sure,<sup>84</sup> but as we show in Figure 3, ideology seems to do the heavy lifting. A nominee who is ideologically close to a Senator and who is well qualified is a virtual lock for confirmation; Senators have a ninety-six percent chance of voting to confirm him or her. When that same well-qualified nominee is ideologically distant, however, the probability the Senator will vote to confirm drops to sixteen percent. On the other hand, Senators have a forty percent chance of voting to confirm an unqualified but ideologically close nominee. In other words, the punishment for being

81. Garland W. Allison, *Delay in the Senate Confirmation of Federal Judicial Nominees*, 80 JUDICATURE 8, 13(1996); Nancy Scherer et al., *Sounding the Fire Alarm: The Role of Interest Groups in the Lower Federal Confirmation Process*, 70 J. POL. 1026 (2008); Martinek et al., *supra* note 74, at 350.

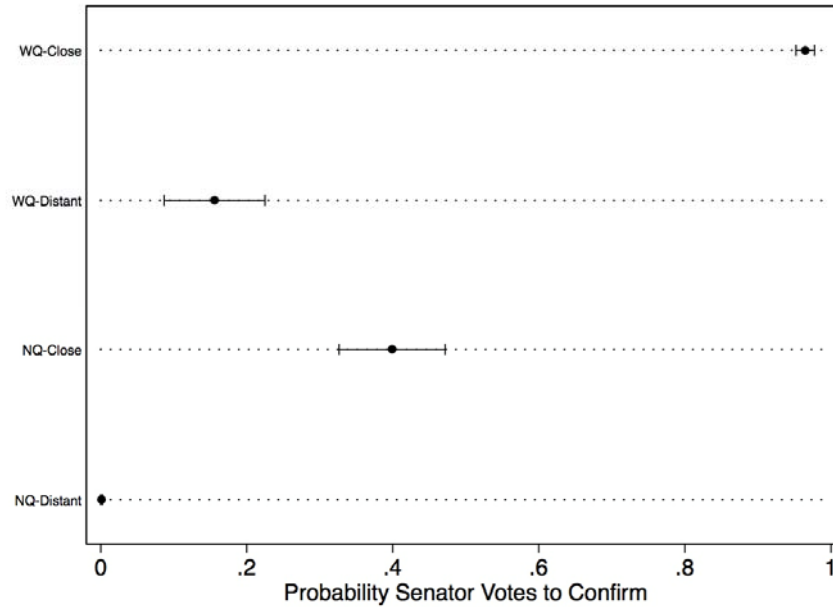
82. LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 103 (2005).

83. Epstein et al., *supra* note 79.

84. EPSTEIN & SEGAL, *supra* note 82, at 102-06; Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525, 530-32 (1990).

ideologically distant is greater than the punishment for being unqualified. In short, it appears that a nominee's ideology influences Senators more than her qualifications.

FIGURE 3: JOINT EFFECT OF QUALIFICATIONS AND IDEOLOGICAL DISTANCE ON SENATOR'S VOTE TO CONFIRM A SUPREME COURT NOMINEE



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Thus far, we have established three features. First, we showed that many (though not all) scholars believe nominees to federal judgeships should be confirmed primarily on their qualifications, and that the role of ideology should be minimized. Second, we discussed some of the major reforms scholars have put forward to amend the appointment process and move it towards a more marked emphasis on qualifications. Third, we showed that while Senators certainly do consider nominees' qualifications, ideology plays a stronger role in Senators' decisions to vote to confirm nominees. Thus, the data would suggest that the reformers' fears have empirical footing.

Yet, the empirical findings we discussed above largely focus on how Senators *vote* and, further, how they vote on *Supreme Court* nominations. Lower federal court nominations are different in significant ways and demand their own examination. Reforms to the judicial appointment process must therefore examine more specifically how they might or might not succeed, given the dynamics that apply in the appointment of those lower court judges.

The most important institutional feature about lower federal court nominations, at least for our purposes here, is the role of home-state Senators. Senators have institutional powers that they can use privately to block or delay nominations. By obstructing some types of nominees, Senators may select out nominees on ideological grounds, leaving us to observe a lessened ideological role when it comes to actual confirmation votes.

Indeed, Senate obstruction over nominations has become commonplace. Some nominees do not even receive a Committee hearing or a final up or down vote on the Senate floor.<sup>85</sup> And most nominees who *do* see a floor vote must wait longer these days than in the past. For example, circuit court nominees in the 95th, 96th, and 97th Congresses waited (respectively) 21.2, 47.7, and 25.8 days for their hearings.<sup>86</sup> But Circuit court nominees in the 105th, 106th, and 107th Congresses waited (respectively) 230.9, 235.3, and 238.4 days for their hearings.<sup>87</sup> By all indicators, gridlock in lower court nominations, particularly at the prehearing stage, has become the norm.<sup>88</sup> Indeed, research examining confirmation delay suggests that the duration of the confirmation process is associated with more overtly ideological, political behavior.<sup>89</sup> Of particular note is the finding that both divided government (i.e., split party control between the White House and the Senate) and partisanship by the Chair of the Senate Judiciary Committee are strongly associated with increasing delays.<sup>90</sup> Considering that many of the obstructive weapons in the Senatorial arsenal—e.g., holds and blue slips—require (and often receive) the Chair’s assent, it seems possible that more aggressive, political use of these devices have led to the observable slowdowns and obstruction.

All this suggests, then, that scholars must consider the private, behind-the-scenes institutional behavior of Senators.<sup>91</sup> In the case of lower court appointments, the publicly observable up or down vote on the Senate floor may be just the tip of the iceberg. Unfortunately, however, we know little about how Senators use their obstructive institutional tools in the judicial appointment process. In the next section, we examine these obstructive tactics. We highlight three powerful obstructive tools, how Senators use them, and how these tools influence lower court nominations.

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85. Goldman, *supra* note 3, at 253 tbl.1, 254 tbl.2.

86. *Id.* at 254 tbl.2.

87. *Id.*

88. *Id.* at 257 tbls.5–6 (combining individual indicators of gridlock into one comprehensive “gridlock index”); Roger E. Hartley & Lisa M. Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 117 POL. SCI. Q. 259, 270–71 fig. 2 (2002).

89. Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947–1998*, 46 AM. J. POL. SCI. 190, 197 (2002) (finding that divided government significantly increases delay of confirmation in lower court nominations).

90. Hartley & Holmes, *supra* note 88, at 274–76.

91. See, e.g., STEIGERWALT, *supra* note 2, at 37–41 (describing how “some judicial nominations are delayed or impeded by private political fights”).

### III. OBSTRUCTIVE SENATE TACTICS: FILIBUSTERS, HOLDS, AND BLUE SLIPS

The story of the modern Senate is a tale of across-the-board increases in obstruction and gridlock. This increase in Senate obstruction is undoubtedly part of a broader trend toward divided government, polarization, and legislative stalemate.<sup>92</sup> Three institutional tools in particular—filibusters, holds, and blue slips—apply to the appointment process. While the norms and usage of these tools will vary, they all stem from the chamber's lack of a formal, majoritarian method for ending debate.<sup>93</sup> As such, they play critical roles in whether the Chair of the Senate Judiciary Committee even takes the step of setting up a Committee hearing.<sup>94</sup>

#### A. *Filibusters*

The U.S. Senate lacks a simple, majoritarian rule for ending debate, which allows members to obstruct chamber business by consuming floor time. Time in Congress is especially valuable, given the increase in both chamber responsibilities and the number of its members. As a consequence, Senators introduce a greater number of bills, increasingly seek floor time for debate, and consider a wide range of viewpoints and issues. In turn, they spend more time considering trivial measures and engage in protracted debate over the increased number of controversial ones.<sup>95</sup> Scholars have speculated that such time demands have led to substantial policy costs, as legislative sessions end before proposals can be considered and passed.<sup>96</sup>

In the House, these increased demands are dealt with by restrictive rules governing the time proposals can be debated.<sup>97</sup> These rules also regulate the number and nature of the amendments offered.<sup>98</sup> Restrictive rules in that chamber are issued by the Rules Committee. In 1975, the Speaker was given the power to appoint all members of the Rules Committee.<sup>99</sup> This appointment power led to a substantial partisan advantage

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92. SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* 15–19 (2003); GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* 279–81 (2006).

93. SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE* 9–13 (1997); GREGORY KOGER, *FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE* 3–4 (2010); WAWRO & SCHICKLER, *supra* note 92, at 7–9.

94. E. Stewart Moritz, “Statistical Judo:” *The Rhetoric of Senate Inaction in the Judicial Appointment Process*, 22 *J.L. & POL.* 341, 352–54 (2006).

95. Michael S. Lynch & Anthony Madonna, *The Vice President in the U.S. Senate: Examining the Consequences of Institutional Design* 3 (2009) (unpublished paper presented at the University of Georgia American Political Development Working Group) (on file with authors).

96. Bruce I. Oppenheimer, *Changing Time Constraints on Congress: Historical Perspectives on the Use of Cloture*, in *CONGRESS RECONSIDERED* 393, 396 (Lawrence C. Dodd & Bruce I. Oppenheimer, eds., 3d ed. 1985).

97. KOGER, *supra* note 93, at 53–56, 104–06.

98. GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* 56–59 (2005).

99. DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 98 (1991).

on the committee—for example, in the 111th Congress, majority party Democrats controlled nine of the committee’s thirteen seats.<sup>100</sup> Scholars of political parties argue that the majority party’s ability to control the committee confers upon it an unconditional power to block unpopular, party-splitting measures from the floor and manage legislative time effectively.<sup>101</sup>

In contrast, the ability of a minority to defeat or delay legislation by filibustering is one of the most well-known features of the U.S. Senate. Majorities in that chamber lack the ability to issue restrictive floor rules. Small groups or individuals from either party can obstruct the legislative process. While three-fifths of the chamber can vote to invoke cloture and end debate, the process is time consuming.<sup>102</sup> Despite the introduction of the cloture rule in 1917, incidents of obstruction have increased fairly dramatically in the latter half of the twentieth century as the Senate increased to 100 members and responsibilities and workload increased.<sup>103</sup> Indeed, recent literature demonstrates that obstruction is on the rise in the Senate. Binder and Smith and Bell and Overby report an increase in the number of manifest filibusters on the Senate floor.<sup>104</sup> Smith and Koger have both highlighted the dramatic increase in the number of cloture petitions filed throughout the most recent decade.<sup>105</sup> Smith supplements this with evidence highlighting an increase in the number of objections to unanimous consent agreements and a sharp growth in the number of “key votes” subject to cloture votes.<sup>106</sup>

100. STAFF OF HOUSE COMM. ON RULES, 111TH CONG., RULES ADOPTED BY THE COMMITTEES OF THE HOUSE OF REPRESENTATIVES at II (Comm. Print 2009), <http://www.gpo.gov/fdsys/pkg/CPRT-111HPRT52561/pdf/CPRT-111HPRT52561.pdf>.

101. See generally Gary W. Cox & Mathew D. McCubbins, *Agenda Power in the U.S. House of Representatives, 1877 to 1986*, in PROCESS, PARTY AND POLICY MAKING: FURTHER NEW PERSPECTIVES ON THE HISTORY OF CONGRESS (David Brady & Mathew McCubbins eds., 2002); COX & MCCUBBINS, *supra* note 98.

102. A cloture petition must lie over for two calendar days before it is voted on. If adopted by three-fifths of the chamber, the cloture petition was subjected to thirty additional hours of post-cloture debate before the nomination could be voted on by a simple majority. Thus, a single nomination could cause a great amount of delay to Senate’s agenda. In January of 2013, the Senate adopted a minor revision to the rules governing consideration of nominations. Specifically, post-cloture debate time would be lowered to eight hours for lower-level executive branch nominations and two hours for district court judges. These changes were not made to the Senate’s standing rules and will expire at the end of the 113th Congress. Measures that alter the Senate’s standing rules require a two-thirds majority to invoke cloture. Jeremy W. Peters, *New Senate Rules to Curtail the Excesses of a Filibuster*, N.Y. TIMES, Jan. 24, 2013, <http://www.nytimes.com/2013/01/25/us/politics/bipartisan-filibuster-deal-is-reached-in-the-senate.html>.

103. BINDER & SMITH, *supra* note 93, at 13; KOGER, *supra* note 93, at 133–36; WAWRO & SCHICKLER, *supra* note 92, at 260; see also FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* 239 (1940); Lauren Cohen Bell & L. Marvin Overby, *Extended Debate over Time: Patterns and Trends in the History of Filibusters in the U.S. Senate 11* (2007) (unpublished manuscript) available at [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/1/9/6/7/6/pages196768/p196768-1.php](http://citation.allacademic.com/meta/p_mla_apa_research_citation/1/9/6/7/6/pages196768/p196768-1.php); Lynch and Madonna, *supra* note 95, at 19.

104. BINDER & SMITH, *supra* note 93, 9–11; Bell & Overby, *supra* note 103, at 11.

105. Steven S. Smith, *The Senate Syndrome*, 35 ISSUES IN GOVERNANCE STUD. 1 (2010); KOGER, *supra* note 93.

106. Smith, *supra* note 105, at 5–6, 9.

Given the potent threat posed by filibusters, the Senate frequently operates under unanimous consent agreements to manage routine chamber business.<sup>107</sup> This requires party leaders to work with obstructive Senators, frequently resulting in some form of a trade-off.<sup>108</sup> These trade-offs include moderating the ideological content of a measure, ignoring a bill or nomination completely, or providing side payments through logrolling.<sup>109</sup> The prospect of these trade-offs provides members with a strong incentive to threaten obstruction on a wide range of legislation or nominations. Due to the large number of nominations that require Senate approval and the importance of conserving time, the Majority Leader generally takes such threats seriously.<sup>110</sup>

### B. Holds

A Senatorial hold is a related obstructive tactic (in the sense that it takes advantage of the lack of simple majoritarian means of ending debate) that can delay or block a judicial appointment.<sup>111</sup> A hold involves an anonymous request from a Senator that her party leader delay any floor action, usually because that Senator plans on objecting to whatever is under consideration. A hold is therefore something like a formal prefilibuster, and it is undoubtedly an important consideration for party leaders shepherding legislation or nominees through the Senate.<sup>112</sup> For one thing, it makes clear what parties would otherwise only be able to anticipate. For another thing, party leaders who do not act on hold requests might very well incite retaliatory action in the form of “objections to unanimous consent requests and filibusters.”<sup>113</sup>

Party leaders usually acquiesce to anonymous hold requests, which makes the appointment of judges politically tricky. For example, during the Clinton administration, Senate Majority Leader Trent Lott honored holds from Republican Senators, which contributed greatly to the holdup

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107. Scott Ainsworth & Marcus Flathman, *Unanimous Consent Agreements as Leadership Tools*, 20 LEGIS. STUD. Q. 177, 178 (1995); Smith, Steven S. and Marcus Flathman, *Managing the Senate Floor: Complex Unanimous Consent Agreements since the 1950s*, 14 LEGIS. STUD. Q. 349, 351 (1989).

108. While not exclusively, obstruction in the Senate is most frequently associated with members of the minority. When a unanimous consent agreement is not in place, a motion to proceed to consideration is in order and subject to majority approval (though a cloture vote on the motion to proceed may be necessary). As such, the legislative agenda is typically set by the majority party, and minority party obstructionists typically (but not always) have less to sacrifice by a manifest filibuster. See DEN HARTOG & NATHAN MONROE, *COSTLY CONSIDERATION: AGENDA SETTING AND A MAJORITY PARTY ADVANTAGE IN THE U.S. SENATE* (2011) and Sean Gailmard & Jeffrey A. Jenkins, *Negative Agenda Control in the Senate and House: Fingerprints of Majority Party Power*, 69 J. POL. 689 (2007) for a more detailed discussion of majority party control in the Senate.

109. See BINDER AND SMITH, *supra* note 93, at 151.

110. *Id.*

111. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 143 (2000).

112. We should point out that in a comprehensive study of holds in the lower court appointment process to date, Steigerwalt finds that holds are less utilized than might be expected or assumed, and that they are usually not employed for ideological reasons, but for the purpose of extracting concessions from other Senators on unrelated matters. STEIGERWALT, *supra* note 2, at 91.

113. WALTER J. OLESZEK, CONG. RESEARCH SERV., RL 98712, “HOLDS” IN THE SENATE (2008).

on Clinton's nominees.<sup>114</sup> Similarly, in October of 2004, after Democrats successfully filibustered federal appeals court nominee Charles W. Pickering's nomination, President George W. Bush recess appointed Pickering.<sup>115</sup> Democrats announced that they would place holds on all pending judicial nominees unless President Bush promised to refrain from recess appointing other judges.<sup>116</sup> Bush agreed.<sup>117</sup>

And, in 2004, Senator Harry Reid (D-NV) placed holds on over 175 of President Bush's executive branch nominees.<sup>118</sup> In exchange for releasing those holds, Bush agreed to place Reid's former aid, Gregory Jaczko, on the Nuclear Regulatory Commission.<sup>119</sup> The appointment had long been sought by Reid, as NRC approval was necessary in order for the Department of Energy to begin construction of the nuclear waste repository in Nevada.<sup>120</sup> To placate Reid, Bush used his recess appointment power to place Jaczko on the NRC.<sup>121</sup> In response, Reid released his holds.<sup>122</sup>

### C. *Blue Slips*

Blue slips are perhaps the most relevant obstructive tactic Senators can employ in the lower court appointment process. Blue slips work in the following way: After the President formally nominates someone to a lower federal court, and transmits that nomination to the Senate, the nomination is sent to the Chair of the Senate Judiciary Committee.<sup>123</sup> The Judiciary Committee counsel sends a blue slip—literally, a blue slip of paper—to the nominee's two home-state Senators.<sup>124</sup> Each of the two Senators has three options. First, she can return the blue slip to the Chair with a positive recommendation, which means she will not hold up the nomination.<sup>125</sup> Second, she can return the blue slip with a negative recommendation, which formally indicates express hostility to the nomination and a possible intent to block it.<sup>126</sup> Third, she can simply refuse to

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114. See Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 235 (2001).

115. Neil A. Lewis, *Bypassing Senate for Second Time, Bush Seats Judge*, N.Y. TIMES, Feb. 21, 2004, at A1.

116. Ryan C. Black et al., *Assessing Congressional Responses to Growing Presidential Powers: The Case of Recess Appointments*, 41 PRESIDENTIAL STUD. Q. 570, 578 (2011).

117. *Id.*

118. H. Josef Hebert, *In Deal, Aide to Reid To Be Named to NRC*, WASH. POST, Nov. 23, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A5557-2004Nov22.html>.

119. *Id.*

120. *See id.*

121. *Id.*

122. *Id.* Reid's holds were placed on nominees to "a range of federal departments and agencies, including Commerce, Education, Energy, Housing and Urban Development, Interior, Justice, State and Transportation, among others." John Bresnahan, *Reid Puts Blanket Hold on Bush Nominees*, ROLL CALL, June 14, 2004, [http://www.rollcall.com/issues/49\\_137/-5885-1.html](http://www.rollcall.com/issues/49_137/-5885-1.html).

123. Sarah A. Binder, *Where Do Institutions Come From? Exploring the Origins of the Senate Blue Slip*, 21 STUD. AM. POL. DEV. 1, 1 (2007).

124. *Id.*

125. *Id.* at 2.

126. *Id.*



return it, which is treated as a negative recommendation.<sup>127</sup> If even one home-state Senator has a negative recommendation, the process slows down, and the Chair may even refuse to schedule a hearing.<sup>128</sup>

Judiciary Committee Chairs historically have varied greatly in their treatment of negative or unreturned blue slips, but, regardless, a negative blue slip is likely to generate negative consequences for the nominee.<sup>129</sup> For instance, “[u]nder some chairs, the absence of a blue slip has amounted to ‘an automatic and mechanical one-member veto over nominees’; under others, it has imposed merely a substantial obstacle that might be overcome by a decision of the full Committee.”<sup>130</sup> As originally intended when it first emerged in 1913, the blue slip was simply an information-gathering tool that would allow the Judiciary Committee to gauge the degree of opposition to the nominee,<sup>131</sup> but under the leadership of Senator James Eastland (D-MS) the process became an obstructive tool.<sup>132</sup> Eastland refused to schedule any hearings for a nominee who failed to receive two positive blue slips.<sup>133</sup>

The blue slip process, while frustrating to Presidents and Senators of the President’s party, is an established feature of the nomination and confirmation process. Today, while individual Judiciary Chairs may treat blue slips differently,<sup>134</sup> it is fair to say that a negative blue slip has a negative effect on the nomination. By all indications, a negative or unreturned blue slip acts as a “silent” or “de facto” anchor that drags down the nomination.<sup>135</sup> For example, Senator Barbara Boxer (D-CA) employed the blue slip to force President George W. Bush’s Ninth Circuit nominee Christopher Cox to withdraw from consideration, and the threat of other uses of the procedure forced both sides to give a bit to each other: Democrats would be allowed to blue slip nominees, but that action would be made public.<sup>136</sup> Clearly, Senate Republicans realized that they needed to work with Senate Democrats rather than work around the blue slips.

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127. Brandon P. Denning, *The Judicial Confirmation Process and the Blue Slip*, 85 JUDICATURE 218, 220 (2002).

128. *Id.* Readers familiar with the norm of Senatorial courtesy will notice the general similarity with blue slips—indeed, Senatorial courtesy “has been institutionalized by the Senate Judiciary Committee in the form of the . . . ‘blue slip’ procedure.” David S. Law, *Appointing Federal Judges: The President, The Senate, and the Prisoner’s Dilemma*, 26 CARDOZO L. REV. 479, 494 (2005). The main difference is that Senators not from the President’s party receive a blue slip, whereas Senatorial courtesy is traditionally extended only to the home-state Senators of the President’s own party. Denning, *supra* note 127, at 220 n.6.

129. Denning, *supra* note 127, at 220.

130. Law, *supra* note 128, at 494.

131. Binder, *supra* note 123, at 10–12.

132. Mitchel A. Sollenberger, *The Blue Slip: A Theory of Unified and Divided Government, 1979-2009*, 37 CONGRESS & THE PRESIDENCY 125, 128 (2010).

133. *Id.*

134. Senator Eastland, without discussion, killed all nominations that generated a negative blue slip, *id.*, but today’s Chairs may move forward despite a negative blue slip. *Id.* at 132.

135. Goldman et al., *supra* note 114, at 238; Denning, *supra* note 127, at 218.

136. Denning, *supra* note 127, at 218–19.

The blue slip has thus been a major part of the “evolution of a traditional patronage-oriented, judicial-selection process into a much more presidentially driven and often policy-oriented process in which the institutional prerogatives of the Senate as a whole are trumped by partisan divisiveness.”<sup>137</sup> That is to say, both parties seem to support the blue slip when their horse is being gored—this is the principal contribution of Elliot Slotnick’s interview-based study of Senators’ attitudes toward the blue slip.<sup>138</sup> Indeed, efforts by Senate Republicans in the early years of the George W. Bush administration to propose changes to the blue slip process to make it easier for the President to push nominees through the process precipitated a backlash by Senate Democrats, who then went on to the more drastic measure of filibustering several circuit court nominees.<sup>139</sup> Likewise, Senator Ted Kennedy scrambled in the later years of the Carter administration to alter the blue slip process and make it easier for President Carter’s nominees to get a Judiciary Committee hearing, but his efforts met similar resistance.<sup>140</sup>

We have, then, reason to expect that Senators obstruct judicial nominees for policy and political reasons. The examples provided above give us more than enough circumstantial reason to suspect so. Yet, our goal is to examine obstruction more systematically and less anecdotally. To do so, we turn to social science. In the next part, we present our theory of the conditions under which Senators use their blue slip privileges to obstruct lower court nominations.

#### IV. THEORIZING SENATE OBSTRUCTION USING BLUE SLIPS

In this Part, we lay out our theory of the conditions under which Senators use their private obstructive powers. Building on existing work that examines the role of ideology, we offer a theory for the use of obstructive tactics—a theory that is rooted in literature on the policy motivations of Senators. Again, we seek to: (1) examine the conditions under which Senators work behind the scenes to obstruct lower court nominations; (2) determine whether a Senator who is ideologically distant from a nominee will obstruct her because of their ideological differences, or whether the Senator allows the well-qualified nominee to move forward in the process; and (3) provide empirical evidence to scholars and policy makers as they debate whether to reform the process and, if so, how.

We begin by examining how ideology and qualifications might influence whether Senators use their blue slips to obstruct nomination to

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137. Elliot E. Slotnick, *Appellate Judicial Selection During the Bush Administration: Business As Usual or A Nuclear Winter?*, 48 ARIZ. L. REV. 225, 244–45 (2006).

138. Elliot E. Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate’s Role?*, 64 JUDICATURE 60, 73 (1980).

139. Slotnick, *supra* note 137, at 235. Senator Orrin Hatch (R-UT), then the Chair of the Judiciary Committee, proposed that a blue slip only stop action on a nomination if both home-state Senators returned a negative blue slip. Denning, *supra* note 127, at 218.

140. Denning, *supra* note 127, at 220; Sollenberger, *supra* note 132, at 131–33.

lower courts. We then discuss contextual features that might also influence their obstructive behavior.

### A. *The Role of Ideology*

That ideology and policy goals motivate Senators in the judicial appointment process is beyond dispute.<sup>141</sup> We discussed above some of the empirical evidence highlighting the role of ideology.<sup>142</sup> To this list we could add the work of Sarah Binder and Forrest Maltzman, who show that nominees to federal circuit courts are less likely to be confirmed when their home-state Senator is ideologically distant from the President.<sup>143</sup> Binder, Lawrence, and Smith likewise find that as the size and ideological cohesiveness increases within the majority party, the number of filibusters per session increases.<sup>144</sup> Accordingly, we expect that ideological considerations will motivate Senators as they determine whether to return a positive or negative blue slip to the Judiciary Chair. Stated more specifically, we expect that the more ideologically distant a Senator is from a nominee, the more likely the Senator will be to return a negative blue slip (or refuse to return one at all).

### B. *The Role of Qualifications*

Senators, of course, also pay attention to qualifications when they determine whether to confirm nominees.<sup>145</sup> Beyond the empirical evidence we provided above, even a brief perusal of the names of failed nominees shows the importance of qualifications. Harriet Miers saw her chances of becoming a Supreme Court Justice disappear after serious concerns arose over her qualifications.<sup>146</sup> G. Harrold Carswell, one of Nixon's failed High Court nominees, was universally held to be, at best, mediocre.<sup>147</sup> Among lower federal court judges, the trends are the same.

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141. See, e.g., Binder & Maltzman, *supra* note 89; Martinek et al., *supra* note 74.

142. See discussion *supra* Part I.C.

143. SARAH A. BINDER & FORREST MALTZMAN, *ADVICE AND DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY* (2009) 91–93.

144. Sarah A. Binder et al., *Tracking the Filibuster, 1917-1996*, 30 AM. POL. RES. 407, 416 (2002). Conversely, Gregory Koger finds no link between the amount of partisan polarization and the growth of obstruction in the chamber. See *supra* note 93, at 145. These conflicting results are likely due to the difficulty in measuring filibusters. Determining whether a filibuster has occurred is difficult for several reasons. First, determining whether or not a filibuster has taken place is almost entirely arbitrary. While some scholars define a filibuster as an outright attempt to kill a bill, others will count attempts to delay the vote or extract concessions as filibustering. Second, determining the goal of a manifest filibuster is also difficult. When a successful filibuster occurs, it often kills not only the underlying bill but other pieces of legislation that would have been considered later in the session. Finally, measurement of obstruction is inconsistent throughout congressional history. Specifically, accurate accounts are far easier to come in the most modern congresses, when sources like Congressional Quarterly give detailed summaries of legislation. By examining all nominations subjected to a blue slip, however, we can more accurately examine the effect of obstruction in the chamber.

145. EPSTEIN & SEGAL, *supra* note 82, at 103–06; Martinek et al., *supra* note 74.

146. Elisabeth Bumiller & Carl Hulse, *Bush's Court Choice Ends Bid; Conservatives Attacked Miers*, N.Y. TIMES (Oct. 28, 2005), [http://www.nytimes.com/2005/10/28/politics/politicsspecial1/28confirm.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2005/10/28/politics/politicsspecial1/28confirm.html?pagewanted=all&_r=0).

147. EPSTEIN & SEGAL, *supra* note 82, at 66–67.

Consider Michael Wallace's nomination to the Fifth Circuit. The American Bar Association determined, based in part on Wallace's previous experience on the Legal Service Corporation, that he displayed a lack of judicial temperament and held that he was not qualified.<sup>148</sup> Shortly thereafter, Wallace was forced to withdraw his nomination.<sup>149</sup> Janice Rogers Brown, too, saw her nomination to the D.C. Circuit nearly sink after the ABA rated her as barely qualified.<sup>150</sup>

Given these findings, and the role that qualifications seemed to have played in some of the most famous instances of confirmation failures, we expect that 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. On the other hand, when the Senator perceives the nominee to be less qualified, she will be more likely to return a negative blue slip.

### C. *The Interactive Effect of Ideology and Qualifications*

While we expect that ideological distance and nominee qualifications will independently influence how Senators exercise their blue slip privileges, we also expect those features to operate jointly with each other.<sup>151</sup> Research suggests that even ideologically extreme Supreme Court nominees are confirmed when they are highly qualified.<sup>152</sup> Yet, we do not believe qualifications will save ideologically extreme circuit court nominees. First, confirmation votes take place in public, but obstruction occurs in private. Senators' incentives in the two environments are dramatically different. Gone are the days when Senators cast voice votes for justices.<sup>153</sup> Today, they must record their votes and defend them publicly.<sup>154</sup> And public pressure can persuade Senators to vote for extreme nominees because of their qualifications.<sup>155</sup> That is, the public generally does not want Senators to vote to confirm or oppose judicial nominees based solely on ideological grounds.<sup>156</sup> The blue slipping process, howev-

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148. *Statement of Stephen L. Tober and Kim J. Askew and Thomas Z. Hayward, Jr. on Behalf of the Standing Committee on Federal Judiciary of the American Bar Association Concerning the Nomination of Michael Brunson Wallace to Be Judge of the United States Court of Appeals for the Fifth Circuit Before the Committee on the Judiciary, United States Senate 20–21* (July 12, 2006), <http://www.americanbar.org/content/dam/aba/migrated/scfedjud/statements/wallace.authcheckdam.pdf>

149. R. Jeffrey Smith, *4 Nominees to Appeals Court Are Dropped*, WASH. POST (Jan. 10, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/09/AR2007010900714.html>.

150. EPSTEIN & SEGAL, *supra* note 82, at 113.

151. See Cameron et al., *supra* note 84, at 530–31; see also EPSTEIN & SEGAL, *supra* note 82, at 102–03.

152. Cameron et al., *supra* note 84, at 531.

153. *Id.* at 526 tbl.1 (indicating that the Senate has not held a voice vote for a Supreme Court nominee since 1965).

154. EPSTEIN & SEGAL, *supra* note 82, at 100–02.

155. Indeed, Johnson and Roberts show that going public can help Presidents get extreme Supreme Court nominations confirmed. See Timothy R. Johnson & Jason M. Roberts, *Presidential Capital and the Supreme Court Confirmation Process*, 66 J. POL. 663, 679 (2004); Timothy R. Johnson & Jason M. Roberts, *Pivotal Politics, Presidential Capital, and Supreme Court Nominations*, 32 CONGRESS & THE PRESIDENCY 31, 38 (2005).

156. See generally Johnson & Roberts, *Pivotal Politics*, *supra* note 155.

er, takes place outside the public's view. If a Senator returns a negative blue slip to the Judiciary Chair, the Chair can simply (if he desires) refuse to schedule a hearing. So, Senators may block highly qualified nominees without need to explain why publicly. They can, in short, base their blue slipping behavior on ideological considerations and escape public scrutiny when so doing.

Second, because circuit court judges can make significant policy, Senators have strong incentives to pursue ideological goals when it comes to filling circuit court vacancies. It is increasingly clear that “[t]he [federal] circuit courts play by far the greatest legal policymaking role in the U.S. judicial system.”<sup>157</sup> 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.<sup>158</sup> And the Supreme Court rarely reviews circuit decisions.<sup>159</sup> Indeed, as Brudney and Ditslear show, the Supreme Court reviewed roughly 0.2% of circuit court decisions in 2000.<sup>160</sup> 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.<sup>161</sup> Knowing this, Senators have strong incentives to “get it right” when supporting or opposing circuit court nominees.

Simply put, because the blue slipping process takes place in private, and because circuit court judges are more important policy makers than district court judges, we expect legal qualifications will not mitigate the negative effects of ideological distance for these positions. That is, Senators will return negative blue slips for ideologically distant circuit court nominees, regardless of their qualifications. Conversely, they will return positive blue slips for ideologically distant district court nominees who are highly qualified.

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157. FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 2 (2007).

158. This number reflects cases terminated on the merits after oral hearings or submission on briefs. See U.S. COURTS, *JUDICIAL BUSINESS OF THE U.S. COURTS* 38 tbl.S-1 (1997), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1997/tables/s01sep97.pdf>; U.S. COURTS, *JUDICIAL BUSINESS OF THE U.S. COURTS* 42 tbl.S-1 (2008), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/front/JudicialBusinesspdfversion.pdf>.

159. Erin B. Kaheny et al., *Change over Tenure: Voting, Variance, and Decision Making on the U.S. Courts of Appeals*, 52 AM. J. POL. SCI. 490, 491 (2008).

160. James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 L. & SOC. REV. 565, 568 n.3 (2001).

161. Jennifer Barnes Bowie & Donald R. Songer, *Assessing the Applicability of Strategic Theory to Explain Decision Making on the Court of Appeals*, 62 POL. RES. Q. 393, 393 (2009); David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 L. & SOC'Y. REV. 579, 603 (2003).

*D. Contextual Factors and Blue Slips*

There are a host of other factors that also may influence whether Senators return positive or negative blue slips. Chief among these alternative factors are demographics (the nominee's sex, age, and minority status), whether the nominee attended an elite law school, the number of days until the congressional session ends, and the President's popularity.

We examine whether, in the context of our sample, Senators used the blue slip to block the President's female and minority nominees so as to limit their future potential for higher office. During the Bush administration, conservative critics of Senate Democrat obstruction argued that Democrats blocked women and minorities nominated by President Bush to keep them from ever being nominated to the Supreme Court. Claimed one conservative critic: "Senate Democrats oppose qualified conservative minorities and women because they are loathe to place such judges one step from the Supreme Court."<sup>162</sup> The chief counsel of Concerned Women for America went so far as to state that Senate Democrats blocked Bush's minority nominees "to hold on to a segment of their political base."<sup>163</sup> If these stories are correct, we would expect to see Senators using blue slips against women more than against men, and against minority nominees more than against white nominees.

In a similar vein, we might expect to see Senators blocking young nominees. It has been well documented that Presidents in recent years have tried to stack the federal judiciary with young judges so as to ensure the entrenchment of the President's policy beliefs in the lifetime-appointed position.<sup>164</sup> Accordingly, we might expect to observe Senators using their blue slips to block or delay the appointment of such young judges. Further, we also control for whether the nominee attended an elite law school. One might expect Senators to be less likely to blue slip nominees who attended elite law schools.

We next 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.<sup>165</sup>

Finally, we control for the popularity of the President. Popular Presidents are more likely to enjoy legislative success.<sup>166</sup> For example, Paul Light notes that the President is more likely to battle Congress

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162. Andrew M. Alexander, *Democrats Against the Filibuster*, INTELL. CONSERVATIVE (Oct. 27, 2003), <http://intellectualconservative.com/article2786.html>.

163. *Sexism, Racism, Real Roots of Filibusters, Says Women's Group*, CATHOLIC NEWS AGENCY (May 13, 2005, 12:00 AM), [http://www.catholicnewsagency.com/news/sexism\\\_racism\\\_real\\\_roots\\\_of\\\_filibusters\\\_says\\\_womens\\\_group/](http://www.catholicnewsagency.com/news/sexism\_racism\_real\_roots\_of\_filibusters\_says\_womens\_group/).

164. See, e.g., Calabresi & Lindgren *supra* note 12, at 774.

165. See WAWRO & SCHICKLER, *supra* note 92, at 124. See generally KOGER, *supra* note 93, at 78–95 (examining patterns of obstruction in Congress).

166. See JON R. BOND & RICHARD FLEISCHER, *THE PRESIDENT IN THE LEGISLATIVE ARENA* 194–95 (1990); Sarah A. Binder & Forrest Maltzman, *The Limits of Senatorial Courtesy*, 24 LEGIS. STUD. Q. 5, 16 (2004).

when he enjoys high approval.<sup>167</sup> These and other studies suggest that Senators may hesitate to take on popular Presidents directly. Blue slips, however, offer Senators an alternative. Rather than taking on the President publicly, Senators can block his nominations privately. In other words, we expect that when public support for the President is high, Senators will be more likely to return negative blue slips.

## V. ASSESSING THE CONDITIONS UNDER WHICH SENATORS BLUE SLIP

Until recently, scholars and journalists could not examine whether a Senator exercised a positive or negative blue slip unless the Senator personally revealed so to the public, an action that was rare. Between the 107th and 108th Congresses, however, Chairman Leahy and Ranking Member Hatch agreed to make blue slips public.<sup>168</sup> And during the 109th and 110th Congresses, Mitchell Sollenberger was able to acquire blue slip data.<sup>169</sup> We take advantage of this window of opportunity to examine blue slipping behavior and its influence on the judicial appointment process.<sup>170</sup> Our data on blue slips, then, come from the 107th through the 110th Congresses. Using the individual blue slip as our unit of analysis, we examined each home-state Senators' blue slip response per lower court nominee in this period.

### A. *The Dependent Variable: Whether a Senator Returns a Negative Blue Slip*

Our dependent variable, *Negative Blue Slip*, measures whether a Senator returned a negative blue slip to the Judiciary Chair for the nomination under consideration. If the Senator returned a negative blue slip—or failed to return a blue slip—we coded *Negative Blue Slip* as 1. On the other hand, if the Senator returned a positive blue slip to the Chair, we coded the variable as 0. We observed 85 negative or unreturned blue slips and 751 positive blue slips.

### B. *Ideology and Qualifications*

To measure the ideological distance between a Senator and a nominee, we utilized the first-dimension Poole and Rosenthal common space scores—statistical estimates of political actors' latent preferences on a unidimensional left-right ideological scale.<sup>171</sup> More specifically, we began

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167. PAUL C. LIGHT, *THE PRESIDENT'S AGENDA: DOMESTIC POLICY CHOICE FROM KENNEDY TO CLINTON* 110–15 (3d ed. 1999).

168. Sollenberger, *supra* note 132, at 130.

169. *Id.*

170. We should point out, then, that our results might tend to understate the importance of ideology. If Senators are less likely to act on raw ideological considerations when they think the public can see them, one might suspect that they would tone down their ideological use of the blue slip when Reid agreed to release them to the public. That we still observe a strong ideological influence suggests that our results understate the role of ideology.

171. KEITH POOLE & HOWARD ROSENTHAL, *IDEOLOGY & CONGRESS* 32–51 (2d rev. ed. 2007).

by coding the Senator's common space score. To estimate the nominee's preferences, we followed conventional practices and coded her preferences as equal to those of her nominating President. Finally, to generate our variable *Senator-President Ideological Distance*, we calculated the absolute value of the difference between the Senator's common space score and the President's common space score. As this value becomes larger, we expect Senators to be increasingly likely to return a negative blue slip.

To measure a nominee's perceived judicial qualifications, we examined the ratings of the American Bar Association Standing Committee on the Federal Judiciary, which evaluates nominees on a variety of dimensions like professional competence, integrity, and temperament. The Committee provided a three-tiered rating of *not qualified*, *qualified*, or *well-qualified*.<sup>172</sup> A majority-minority split on the Committee could generate split ratings, however. Thus, we generated a seven-point ordinal measure.<sup>173</sup> Our *Nominee Qualifications* variable takes on a value of one to seven, with one being unanimously not qualified and seven being unanimously well qualified.

Finally, to measure the interactive effect of ideological distance and judicial qualifications, we created a variable called *Distance x Qualifications*, which is simply an interactive variable that consists of the measure of the Senator's ideological distance from the President multiplied by the ordinal value of the ABA's qualification rating. And to determine whether qualifications mitigate the negative effects of ideology differently for district and circuit court nominations, we interacted *Distance x Qualifications* with a variable that identified whether the nomination was to a circuit court—coded as 1—as opposed to a district court—coded as 0.

### C. Contextual Factors

As we stated above, ideology and qualifications are likely the biggest factors playing a role in whether Senators return negative blue slips, but they are not the only factors. Other features also may influence whether Senators exercise negative blue slips. One alternative factor likely to influence whether Senators returned negative blue slips turned on the nominee's personal characteristics. That is, we suggested that Senate Democrats may have used the private blue slipping powers to block Republican women and young Republicans from the bench. We created the variable *Female Nominee*, which takes on a value of 1 if the nominee was a woman and 0 if the nominee was a man. To determine the nominee's sex, we relied on the Federal Judicial Center Biographical

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172. ABA ratings are, of course, not without controversy. See, e.g., Smelcer et al., *supra* note 53.

173. The possibilities were "unanimously not qualified," "split-vote not qualified," "unanimously qualified," "split-vote qualified," etc.



Directory.<sup>174</sup> To determine the sex of nominees who were not included in the FJC directory, we examined their resumes on file at the Office of Legal Policy.<sup>175</sup> Using the same approach, we coded *Minority Nominee* as 1 when the nominee was a racial minority; 0 otherwise. We accounted for whether the nominee attended an elite law school by coding *Elite Law School* as 1 if the nominee attended Harvard, Yale, Columbia, Stanford, Chicago, Berkeley, Michigan, or Northwestern; 0 otherwise.<sup>176</sup> To determine *Nominee Age*, we subtracted the year the nominee was born from the year of her nomination.<sup>177</sup>

Our third alternative factor turns on the number of days left in the congressional session. We argued that use of the blue slip might be more enticing toward the end of a session, because work mounts for Senators and because threats of obstruction during this time are more credible. As such, we created a variable, *Days Until Session Ends*, which is the number of days between when the President nominated the individual and the end of the Senate's session.<sup>178</sup>

Finally, we argued that a fourth factor—Presidential popularity—might also influence whether Senators return negative blue slips. Because popular Presidents are more likely to get what they want, Senators might turn to private obstruction when Presidents are popular. To code *President's Popularity*, we looked to Gallup's survey on Presidential approval at the time of the nomination.<sup>179</sup>

## VI. RESULTS

To test our claims, we employ multivariate analysis. Because our dependent variable is dichotomous, we opt for a probit regression model instead of the more familiar ordinary least squares regression. We test for statistical significance using robust standard errors clustered on the nominee.

Table 1 presents our results. We first present the results of our model without interacted coefficients. The model performs well. The  $X^2$  is statistically significant, which means that we can reject the null hypoth-

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174. See *Biographical Directory of Federal Judges*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Oct 11, 2013).

175. These resumes were formerly available from the Department of Justice Office of Legal Policy, but have since been removed for the 107th and 108th Congresses. They are still available for the 109th and 111th Congresses. See Office of Legal Policy, U.S. DEP'T OF JUSTICE ARCHIVE, <http://www.justice.gov/archive/index-olp.html> (last visited Mar. 3, 2014). For further information on confirmed nominees, see *Biographical Directory of Federal Judges, 1789–present*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Mar. 3, 2014).

176. We followed the same coding approach as Timothy R. Johnson et al., *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006).

177. To determine the year in which the nominee was born, we again returned to the FJC Biographical Directory and the nominees' personal resumes. See *supra* note 174.

178. Data on the number of days between blue slip distribution and the end of the session was too imprecise to be used.

179. *Presidential Approval Ratings—George W. Bush*, GALLUP, <http://www.gallup.com/poll/116500/Presidential-approval-ratings-george-bush.aspx> (last visited Oct. 11, 2013).

esis that the independent variables jointly have no effect. More importantly, the results support our hypotheses. First, we observe a positive and statistically significant association between a Senator's ideological distance from the nominating President and the decision to return a negative blue slip. As Senators become increasingly distant ideologically from the President and his nominees, they are more likely to obstruct the nomination using the blue slip. We also observe that Senators are more likely to blue slip circuit court nominees than district court nominees. The other main coefficient of interest—perceived qualifications—is signed as expected and is statistically significant, meaning that across all nominees, and while holding ideology constant, Senators are less likely to blue slip highly qualified nominees. Finally, we see that Senators are more likely to blue slip at the end of a session.

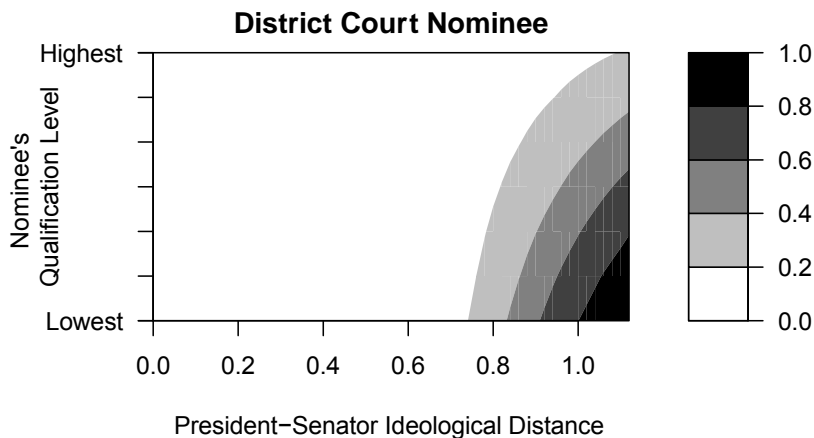
TABLE 1: PROBIT REGRESSION MODEL OF A SENATOR'S DECISION TO RETURN A NEGATIVE BLUE SLIP

Variable	Coefficient (Robust Standard Error)	Coefficient (Robust Standard Error)
Senator-President Ideological Distance	3.56** (0.70)	7.23** (2.79)
Nominee Qualifications	-0.18** (0.07)	0.46 (0.31)
Circuit Court Nominee	0.93** (0.25)	-0.15 (7.46)
Distance x Qualifications	--	-0.77* (0.41)
Qualifications x Circuit Court	--	-0.36 (1.10)
Distance x Circuit Court	--	2.26 (9.36)
Qualifications x Distance x Circuit Court	--	0.28 (1.39)
Days Until Session Ends	-0.002** (0.001)	-0.002** (0.001)
Female Nominee	-0.31 (0.23)	-0.35 (0.24)
Nominee Age	-0.01 (0.02)	-0.01 (0.02)
Presidential Approval	-0.01 (0.006)	-0.009 (0.007)
Nominee Was Minority	-0.05 (0.28)	-0.05 (0.27)
Elite Law School	-0.26 (0.27)	-0.34 (0.30)
Constant	-1.55* (0.92)	-4.37* (1.84)
Log Likelihood	185.51	-178.05
Pseudo-R2	0.33	0.35
Observations	836	836

Notes: \*\* and \* denotes  $p < 0.05$  and  $p < 0.10$ , respectively (two-tailed tests). The standard errors reported in parentheses are robust errors clustered on each of the nominees in the data.

More important, though, are the interactive results. Do qualifications still hold up under ideological stress for circuit court nominations? The data show quite clearly, no. Because the estimates reported in the interactive model in Table 1 are not directly interpretable, we calculated their predicted probabilities.<sup>180</sup> Figure 4 shows the probability of a negative or unreturned blue slip decision as a function of both a nominee's qualifications (on the vertical axis) and the ideological distance between the Senator and the President (on the horizontal axis). The first graph is confined to district court nominations, and the second is confined to circuit court nominations. The shades in these figures represent the likelihood a Senator returns a negative blue slip (or none at all). Darker shades represent a higher likelihood of a negative blue slip, and lighter shades represent a lower likelihood of a negative blue slip.<sup>181</sup>

FIGURE 4: PROBABILITY OF A NEGATIVE OR UNRETURNED BLUE SLIP FOR A DISTRICT COURT NOMINATION AS A FUNCTION OF PRESIDENT-SENATOR IDEOLOGICAL DISTANCE



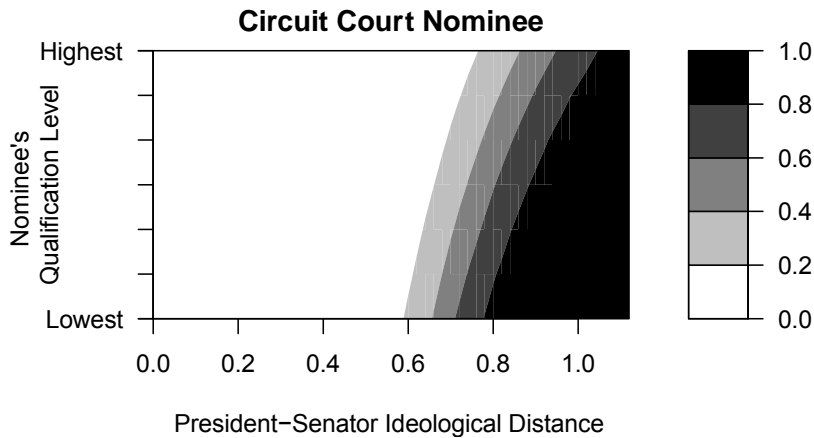
The difference between the two graphs is clear: in the district court and the circuit court, low levels of ideological distance are always associated with low levels of negative blue slipping. Senators who agree ideologically with nominees do not blue slip them. In the case of district courts, however, a perception of high qualifications almost entirely mitigates this effect. Consider, first, a nominee and Senator who are ideological brethren. A highly qualified and a low qualified nominee have little to fear from a blue slip—Senators do not return negative blue slips when they are ideologically close to those nominees. And when the ideological distance between Senator and nominee exceeds 0.80 (and is thus in the

180. See Lee Epstein et al., *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811 (2006).

181. We divided our seven-point ordinal ABA rating variable into high and low categories for ease of presentation.

upper one-third of observations in terms of ideological polarization in our dataset), stellar qualifications swoop in to save the day for the nominee, mitigating the negative effects of ideological distance. For example, consider a nominee who is 0.84 units away ideologically from a Senator. The highly qualified nominee has only a ten percent chance of being blue slipped, while the poorly qualified nominee has a significantly higher forty-two percent chance of being blue slipped. If we examine the sample maximum (when the distance between Senator and nominee is 1.12), a highly qualified nominee has a twenty-two percent chance of being blue slipped, while a low-qualified nominee is virtually guaranteed to see a negative blue slip (a ninety-five percent chance). In short, when it comes to district court nominees, increasing ideological distance between them and their home-state Senator hurts, but can be overcome with stellar qualifications. The same is not true, however, for circuit court nominees.

FIGURE 5: PROBABILITY OF A NEGATIVE OR UNRETURNED BLUE SLIP FOR A CIRCUIT COURT NOMINATION AS A FUNCTION OF PRESIDENT-SENATOR IDEOLOGICAL DISTANCE



In contrast, as Figure 5 shows, circuit court nominee qualifications make no difference once the nominee becomes increasingly distant from the home-state Senator. Ideology gobbles up qualifications. Home-state Senators are just as likely to blue slip an ideologically distant but well-qualified nominee as an ideologically distant poorly-qualified nominee. Again, when the ideological distance between the Senator and nominee is next to nothing, there is very little chance of a negative blue slip. When, however, we approach the upper one-third of cases in terms of ideological polarization, we observe no statistical differences between Senators' blue slips for well-qualified and unqualified nominees. Indeed, at the high end of the distance values, the probability of observing a negative blue slip for the range of qualifications is virtually identical—and virtually guaranteed.

Put plainly, the procedural veto created by the blue slip process affords Senators the opportunity to engage in ideological behavior.<sup>182</sup> And though anecdotal evidence is hardly comparable to this more systematic evidence, these numbers resonate with common perceptions of the increasing politicization of the nomination process for circuit court vacancies. After all, it is clear that the circuit courts are dramatically important courts in the nation in terms of setting legal policy.<sup>183</sup> While they lack the ability to set policy across the nation, the improbability of Supreme Court review ensures that, on most questions, circuit courts will have the final say.<sup>184</sup> It is no surprise, then, that we see particularly striking levels of ideological obstruction via blue slips over circuit court nominations.

As far as our controls go, we observe little effect of personal characteristics on Senators' use of blue slips. Nor do we observe a strong effect of Presidential popularity. As Figure 6 shows, however, we do observe that Senators are more likely to return negative blue slips as the end of the Senate's session nears. For example, when there are 350 days remaining in the session, we observe a six percent chance that a Senator will return a negative blue slip. When there are 200 days remaining, that probability increases to eleven percent. When there are 50 days remaining, the probability climbs to eighteen percent. And, when the Senate is nearly adjourned, we observe a twenty-two percent probability that a Senator returns a negative blue slip. Obstruction near the end of a session is more credible and allows Senators to exact concessions they may want.

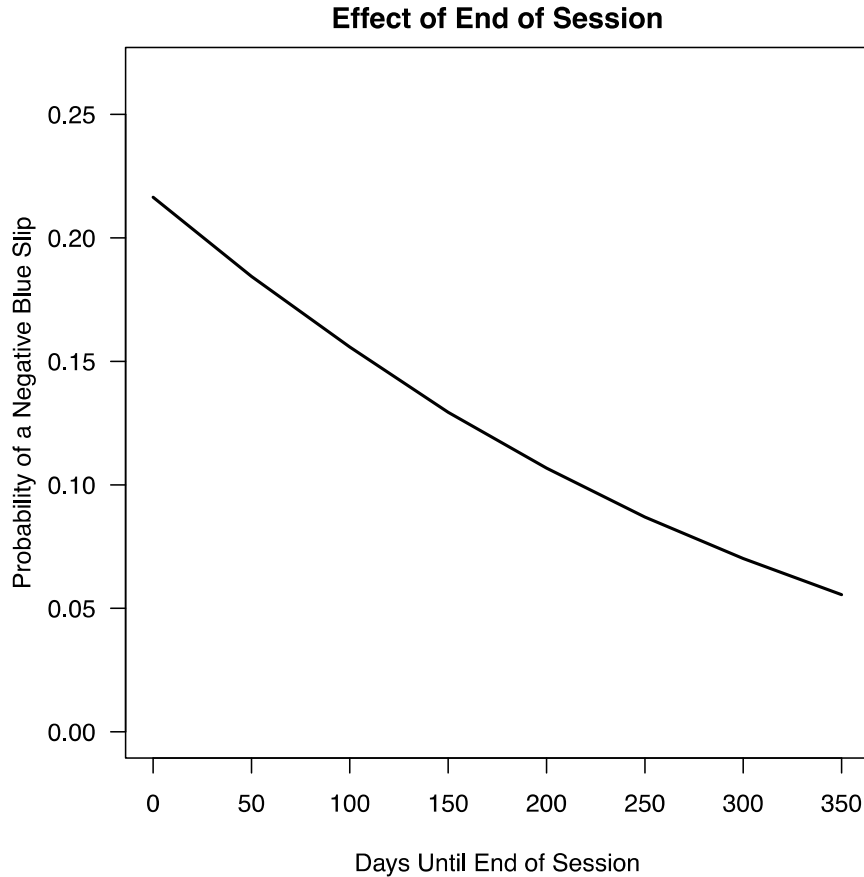
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182. It is notable that these findings differ from the most comprehensive study of blue slipping to date. Looking at publically reported instances of employment of the blue slip (n=20 for Circuit Court nominations since 1985), Amy Steigerwalt finds that “[a]lthough conventional accounts suggest most nominations are killed by senatorial courtesy arising out of ideological objections to the nominee, the reality is quite different. The twenty uses of senatorial courtesy against circuit court nominations since 1985 principally reflect ongoing institutional disputes between senators [*sic*] and presidents [*sic*] over who should hold the power to select lower court nominees.” STEIGERWALT, *supra* note 2, at 65. That is, the blue slip is mostly used to force Presidents to consult the home-state Senators when selecting nominees. Our findings suggest that ideology plays a much greater role than has been appreciated.

183. CROSS, *supra* note 157, at 1–2.

184. See Bowie & Songer, *supra* note 161, at 396.

FIGURE 6: PROBABILITY OF A NEGATIVE OR UNRETURNED BLUE SLIP AS A FUNCTION OF DAYS REMAINING IN CONGRESSIONAL SESSION



## VII. DISCUSSION AND CONCLUSION

The modern nomination and confirmation process for lower court judges has been pilloried for its excessive gridlock and politicization, as well as the facile attempts of Senators and Presidents to cloak their decisions in the language of qualifications and competence. We are only beginning to understand the complexity of the problem, and to understand how practice accords with theory. To be sure, the debate about the systemic health of our nomination and confirmation process is one that is practically bound to be stagnant. There are so many values at stake in evaluating process outputs that the normative high ground can be slippery.<sup>185</sup> We doubt that much of the disagreement can be eliminated. Whether and to what extent ideology should be balanced with qualifications in the process appears to be an irresolvable question, hinging more

185. See discussion *supra* Part I.A.

on one's position on intractable questions like the role of courts in a democratic system or on the virtues of good judging than on consensus values.<sup>186</sup> Nevertheless, as our findings make clear, questions of institutional choice require those who seek to augment the role of any particular consideration in the process to confront the realities of covert Senate obstruction.

We discovered that ideological considerations play a comparatively large role in prehearing procedural action by individual Senators, a finding that helps to explain why nominations to lower courts frequently stall and sometimes fail. The blue slip—originally a procedure for encouraging nominees' smooth navigation through the Senate—has become essentially an ideological weapon for delay and obstruction. We also found that qualifications, as measured by the nominee's ABA rating, do not offset ideological considerations, at least for circuit court nominations. When the Senate considers Supreme Court nominees, most individual Senators publicly advocate for a strong (if not dispositive) role for the nominee's competence and ethics, and prior research has confirmed that they most often do give considerable weight to the nominee's qualifications. Our findings with respect to circuit court nominees suggest that the availability of the blue slip procedural hurdle, combined with the relative importance of the circuit courts in national policy making, gives Senators the cover and incentive to elevate ideological considerations in the calculus in a way that they cannot in the high-profile and public Supreme Court nominations or in the more routine district court nominations. There is no procedural analog in the Supreme Court nomination process—indeed, every nominee, unless withdrawn by the President (or filibustered), is guaranteed a public Senate Judiciary Committee hearing.<sup>187</sup> It is not surprising, then, that circuit court nominations have come to be seen as particularly contentious, gridlocked, and politicized in recent years.

Precisely because procedural hurdles like the blue slip appear to change Senators' behavior and appear closely linked to concerns about gridlock and politicization, advocates for reform must take note of the ways their proposed reforms will interact with (or change) this existing institutional terrain. For example, we know that some commentators argue that a focus on judicial ideology is healthy and necessary for a working balance amongst the three branches of government.<sup>188</sup> Erwin

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186. Take, for example, Stephen L. Carter's argument that we should not consider ideology as a litmus test because it threatens judicial independence. He exclaims, "Why in the world should anyone who believes in the Constitution believe that elected officials should try to check the Court? The institution of judicial review exists precisely to thwart, not to further, the self-interested programs of temporary majorities." CARTER, *supra* note 1, at 87. We can think of a number of scholars who would take issue with this depiction of the role of the Court. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7–8 (2004); JEREMY WALDRON, *LAW AND DISAGREEMENT* 28687 (1999).

187. WATSON & STOOKEY, *supra* note 35, at 7–9.

188. Michael J. Gerhardt, *Merit vs. Ideology*, 26 *CARDOZO L. REV.* 353, 357 (2005). See discussion *supra* Part I.A.

Chemerinsky, Laurence Tribe, and others have argued that the dangers of unchecked Presidential power in packing the federal judiciary justify a strong role for the Senate in filtering out ideological extremists.<sup>189</sup> Senator Charles Schumer has advocated making the Senate Judiciary Committee hearing process a more openly ideological process.<sup>190</sup> Our findings suggest, however, that even if these commentators are right that ideological considerations ought to play a larger role in the confirmation of federal judges, institutionalizing *more* openness might be the wrong way to achieve their goals. When Senators must speak in public about their reasons for supporting or opposing nominees, they face tremendous incentives to couch their reasons in terms of theoretically objective considerations like qualifications and ethics. Senator Schumer is confident that Senators can unlearn this behavior (we are doubtful), but our results suggest that unless reformers change how the public perceives the courts' roles, the Senate can shed the platitudes only if it utilizes the relative opacity of procedures like the blue slip to institutionalize ideological consideration.

Likewise, we know that many commentators urge greater emphasis on objective, non-ideological factors in confirmations,<sup>191</sup> and at least some argue that greater insulation of the confirmation process could help realize these goals.<sup>192</sup> The tendency to link politicization of the process with process transparency is pervasive, leading some to conclude that the independence of appointing politicians might be restored by making the selection process itself more opaque insofar as the questioning of judicial candidates is concerned. Uninhibited by constituency pressures, politicians could have a free and frank discussion with candidates, the contents of which would remain undisclosed to individuals outside of the appointing body.<sup>193</sup>

A more opaque process, it is argued, would take away the incentive for Senators to grandstand<sup>194</sup> and increase the likelihood that nominees would respond more fully to questions.<sup>195</sup>

Our results suggest that these reformers should take note of procedural hurdles like the blue slip. Such private obstructive tools facilitate a

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189. See sources cited *supra* notes 30–36.

190. Charles E. Schumer, *Judging By Ideology*, N.Y. TIMES, June 26, 2001, at A19.

191. See discussion *supra* Part I.A.

192. See, e.g., Pardo, *supra* note 18, at 648–49.

193. *Id.* at 641.

194. NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 21–27 (2005); David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1888–89 (2008) (“[T]he Seventeenth Amendment and the advent of roll-call votes and public hearings on judicial nominations have made senators [*sic*] directly accountable to their constituents for every vote on Supreme Court nominees. In addition, external pressure from interest groups and the media has increased the visibility and the political consequences of those votes. Senators are under considerable pressure to cast a vote consistent with their own ‘policy brand’ because interest groups and constituents pay close attention to votes on judicial nominations. The combined effect of these changes has been intense political pressure on Senators to deliver, or to block, Justices with particular ideological views.”).

195. Pardo, *supra* note 18, at 641–45 n.31.



degree of ideologically driven behavior in lower court nominations that is perhaps even greater than that of the notoriously political Supreme Court nomination process. So strong is the ideological effect of the blue slip that qualification-based considerations seem to play little role in circuit court nominations, at least when it comes to ideologically distant nominees. Greater openness in the process would thus seemingly make it *more difficult* for Senators to consider ideology at the level they do now. Stated differently, it is not likely that reforms insulating the process or adding additional, less-political layers of review, as so many proposals do,<sup>196</sup> will appreciably change the level of ideological consideration in the Senate. Similarly, reforms designed to ensure that the President can preempt the Senate's ideological obstruction by nominating highly qualified candidates<sup>197</sup> will not be completely effective, especially in the case of circuit court nominations, nor will reforms urging changes in questioning style in confirmation hearings.<sup>198</sup> As long as procedural hurdles like the blue slip exist, we can expect high levels of ideologically based obstruction in lower court nominations. To transcend this limitation, reformers would have to focus their efforts on abolishing or diminishing the importance of these kinds of procedural hurdles rather than on reforming the hearing process itself.

Regardless of whether we need more ideology, more qualifications, or less of everything, it is not enough for reformers to redefine the role of confirmation hearings, to incentivize Presidents to select qualified nominees, or to force Senators to explain why they cast final votes for nominees; for real reforms, they will have to dig deep into the Senate as an institution. For better or worse, some of this work has begun. Senators have sought to reform institutional practices that facilitate obstruction prior to the floor stage. For example, on January 26, 2011, the U.S. Senate held a series of votes on resolutions that sought to restrict obstruction in the chamber.<sup>199</sup> Three of these resolutions would have specifically limited the ability of individual Senators to obstruct or filibuster measures on the chamber floor.<sup>200</sup> These three resolutions proposed a lowering of the threshold for ending debate, and as such were highly controversial and generated a good deal of debate among Senators.<sup>201</sup> The package was supported by chamber Democrats and Senate Majority Leader Harry Reid (D-NV), who argued that some change in the chamber's rules

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196. See, e.g., WATSON & STOOKEY, *supra* note 35, at 218 (describing proposals to delegate critical decisions in the process to a nonpartisan committee and to reduce politics by "decreas[ing] public awareness of the process"); Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, 73 OHIO ST. L. J. 287, 299–307 (2012) (proposing a "Confirmation Commission" which would issue recommendations on contested nominees and trigger a deadline for Senate response, which, if not offered, would default to the Committee's recommendation).

197. See, e.g., Choi & Gulati, *supra* note 11, at 302 n.7.

198. See, e.g., CARTER, *supra* note 1, at 191–95.

199. Jackie Kucinich & Jessica Brady, *Changes to Senate Rules Fall Short of Drastic Proposals*, ROLL CALL, (Jan. 27, 2011, 8:14 PM), <http://www.rollcall.com/news/-202907-1.html>.

200. *Id.*

201. See *id.*

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were necessary in order “that the Senate can operate in a way that allows the people’s elected legislators to legislate.”<sup>202</sup> Minority party Republicans, however, remained united in their opposition and defeated all three measures.<sup>203</sup> It is unclear whether similar changes will move forward—or whether they should—but what is clear is that private obstructive tactics like the blue slip allow Senators to behave ideologically, even while they may claim otherwise publicly. We leave it to others to decide the next course of action.

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202. Emily Pierce, *Democratic Trio Introduces Package of Senate Rules Changes*, ROLL CALL, (Jan. 25, 2011, 4:27 PM), <http://www.rollcall.com/news/-202095-1.html>.

203. *Id.*; Carl Hulse, *Senate Approves Changes Intended to Ease Gridlock*, N.Y. TIMES, Jan. 27, 2011, [http://www.nytimes.com/2011/01/28/us/politics/28cong.html?ref=filibustersanddebatecurbs&\\_r=1&](http://www.nytimes.com/2011/01/28/us/politics/28cong.html?ref=filibustersanddebatecurbs&_r=1&).