The Forum

Volume 9, *Issue* 4 2011 *Article* 9

GOVERNING THROUGH THE SENATE

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Recommended Citation:
Black, Ryan C.; Madonna, Anthony J.; and Owens, Ryan J. (2011) "Obstructing Agenda-Setting: Examining Blue Slip Behavior in the Senate," *The Forum*: Vol. 9: Iss. 4, Article 9.
DOI: 10.2202/1540-8884.1476

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Obstructing Agenda-Setting: Examining Blue Slip Behavior in the Senate

Ryan C. Black, Anthony J. Madonna, and Ryan J. Owens

Abstract

Senators increasingly use obstructive tactics to stall or kill legislation. Unfortunately, because senators can obstruct privately, scholars have little understanding of the conditions under which they do so. Using previously unreleased data from 2001-2009, we examine Senate obstruction by focusing on blue slipping behavior. We find that extreme members who do not belong to the president's party are most likely to employ negative blue slips. Thus, as moderate senators continue to be replaced by more extreme members, senators will increasingly use obstructive tactics.

KEYWORDS: Senate, agenda-setting, obstructive tactics

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On January 26, 2011, the United States Senate adopted Senate Resolution 28, which established a standing order requiring Senators to publicize any objections to unanimous consent agreements. The Obama Administration and majority-party Democrats viewed the resolution as a victory. They accused minority-party Republicans of exploiting chamber rules to block bills and nominations that frequently enjoyed broad bipartisan support (Hulse 2011; Pierce 2011). By publicizing Senators' objections, Democrats believed that the resolution would dissuade minority-party Senators from hiding behind Senate rules to block legislation. Of course, Republican Senators were not alone in obstruction. Senate Democratic obstruction over President George W. Bush's judicial nominees was so rampant that then-majority-party Republicans threatened drastic changes in the chamber's rules to deal with it (Binder et al. 2007; Koger 2008; Wawro and Schickler 2006). Obstruction, in short, is pervasive in the modern Senate, with Senators in both parties engaging in it.

Obstruction in the Senate can have considerable consequences. Congressional scholar Norm Ornstein noted that in May of 2009, "only 151 of the 1,100-plus Senate-confirmable positions had in fact been confirmed by the Senate" (Ornstein 2009), leading to severe problems with the functioning of government. In 2010, President Obama complained that "a staggering 63 nominees had been stalled in the Senate because one or more Senators placed a hold on their nomination" (Phillips 2010). In his 2010 year-end report on the federal judiciary, Supreme Court Chief Justice John Roberts called on both parties to work together to resolve the "persistent problem of filling judicial vacancies" (Liptak 2010; Roberts 2010). Indeed, between January 1, 2008, and March of 2010 (when President Obama recess-appointed Craig Becker), the National Labor Relations Board could not issue binding rulings because the Senate could not confirm enough nominees to create a quorum (Berger 2010; Black et al. 2011). In sum, the consequences of Senate obstruction can be severe.

While we know that the ramifications of Senate obstruction can be dramatic, we know much less about the conditions under which *individual* Senators obstruct. To be sure, scholars have hunches as to why Senators obstruct, but to date, few have systematically examined the phenomenon. Why? Because Senators frequently exercise their decision to obstruct in private. As such, reliable empirical data on obstruction have been remarkably hard to come by. Minority-party Senators merely need to inform their party leader that they intend to block legislation or a nomination. The leader then informs the Senate Majority Leader that no unanimous consent to move forward exists. In short, the Senator can obstruct without the public or researchers knowing his or her identity. Tracking the conditions under which Senators obstruct, then, becomes a difficult endeavor—and puts a premium on reliable data.

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Thus we are left with the following questions: from where do Senators derive their obstructive powers, and under what conditions do they obstruct? We address these questions. We begin with a brief overview of obstruction in the modern Senate. We then present a theory for the conditions under which Senators will employ obstructive tactics in the Senate. We then use recently released archival data from one type of obstruction—the blue slip—to generalize to Senate obstruction more broadly. We close by discussing what our findings mean for the broader debate over Senate obstruction, and whether we can expect more or less obstruction in the future.

Obstruction in the Modern Senate

While the United States Senate has many distinguishing institutional features, the lack of a simple-majoritarian rule for ending debate is perhaps the best-known. This dynamic has generated a number of tools that Senators can use to block bills and nominations. We briefly examine three. Manifest filibusters, of course, are discussed the most, but holds and blue slips are also a function of this unlimited debate power.

The filibuster allows an individual or a minority of Senators to obstruct or block a measure that enjoys the support of a chamber majority. The term "filibuster" is perhaps most frequently associated with stories of Southern Senators in the mid-20th century delivering lengthy, round-the-clock speeches against civil rights legislation. In these episodes, Senators attempted to kill bills by preventing final passage votes on them. Because there was no formal, majoritarian way to limit an individuals' ability to debate a measure, Senators would seek to consume so much time on the Senate floor that the session would expire.

Also a function of this unlimited debate power, a *hold* is a request by a Senator to his or her party leader to delay floor action (Oleszek 2008). When a Senator seeks to place a hold on a measure or a nomination, he or she is essentially notifying the party's Majority Leader of an intention to object to that measure or nomination when it is brought to the Senate floor. While it is ultimately up to the Majority Leader to determine whether to honor a hold, failure to do so can have far-reaching implications for the calendar and for the majority's ability to conduct business. As Oleszek (2008) points out, a Majority Leader who ignores a hold might generate objections to unanimous consent agreements and delay or stall action on other Senate issues. In recent years, holds have effectively stalled a significant amount of legislation (Evans and Lipinski 2005).[1]

[1] For example, Senator Richard Shelby (R-AL) recently employed a hold to block over 70 executive branch nominations. And, during the Clinton presidency, Senator James Inhofe (R-OK) employed a blanket hold to block a host of Clinton judicial nominees for years (Rosenbaum 1999).

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Essentially a more formal version of a hold, the *blue slip* is an institutional tool senators use to support or oppose judicial nominees. The blue slip carries with it different norms than filibusters or holds, but its procedural roots are largely the same. As we discuss more fully below, home-state Senators for a nominee to a lower federal court can signal their support or opposition to the nomination by returning a positive or negative blue slip in response to the nomination. If a home-state Senator returns a negative blue slip, the nomination suffers considerable problems and is most likely to go down to defeat. Indeed, as Sollenberger (2004, 424) states: "if a negative blue slip is returned, action almost always slows or stops."

As a consequence of these three institutional powers, the Senate Majority Leader must balance legislative priorities with time. Thus for much of the business that gets scheduled in the Senate, the process is a consensual one in which the majority and minority party leaders forge unanimous consent agreements (Ainsworth and Flathman 1995; Smith and Flathman 1989). Bills or nominations that are not granted unanimous consent are frequently not considered on the chamber floor. While the Senate's rules allow a super-majority of the chamber to proceed to a vote on an obstructed measure through the cloture process, doing so is still time-consuming. A cloture petition must lie over for two calendar days before it is voted on. Then, an additional 30 hours of debate and amending activity can occur before a final vote is taken on the bill or nomination (Davis 2011). The Senate simply lacks the time to move cloture on every obstructed bill or nomination.[2]

As the size and scope of the federal government increased during the latter half of the twentieth century, usage of the filibuster -- and threats of filibusters -- increased dramatically (Binder and Smith 1997; Koger 2010; Wawro and Schickler 2006). That is, as the size of the government increased and as the workload of the Senate increased concurrently, so, too, did the number of measures affected by obstruction. What is more, since the 1970s, individual Senators have increasingly used holds to block unanimous consent agreements. Today, obstruction and threats of obstruction in the Senate are pervasive, and appear to be growing.

Of course, all these matters have attracted the attention of both scholars and journalists. Perhaps not surprisingly, obstructive procedural tools such as the hold and blue slip also produce considerable controversy as a normative matter. Unfortunately, the anonymous nature of their usage has hampered scholars' abilities to examine obstructive tactics. After all, holds, and blue slips are often employed privately, with little to no public access to the identity of the Senators

[2] Senate rule XXII specifies that "three-fifths of the Senators duly chosen and sworn" can end debate. Measures that alter the Senate's standing rules require a three-fifths majority to invoke cloture (Davis 2011).

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using them. Fortunately, however, data on blue slips for the 107th-110th Congresses have become available, allowing us insight into this process as well as, we believe, obstructive tactics more broadly. It is therefore to the task of analyzing blue slips that we now turn.

A Theory of Blue-Slip Behavior

Our theoretical starting point is that Senators will obstruct for ideological reasons. Several recent studies have highlighted the importance of Senator ideology when obstructing or blocking nominations. Binder and Maltzman (2002) and Martinek, Kemper, and Van Winkle (2002) show that political and ideological considerations lead to confirmation delays for judicial nominations. McCarty and Razaghian (1999) report that the broader the opposition to the President's policy views in the Senate, the longer the confirmation delay for executive branch nominations. Binder and Maltzman (2009) show that nominees to federal circuit courts are less likely to be confirmed when their home state Senator is ideologically distant from the President. And Cameron, Cover, and Segal (1990) demonstrate that ideology and nominee qualifications combine to influence a Senator's confirmation vote for Supreme Court Justices.

In a similar vein, there is strong anecdotal evidence to suggest that Senators employ their blue slips for ideological considerations. Consider the nomination of Carolyn Kuhl, whom President George W. Bush nominated to the Ninth Circuit Court of Appeals on June 22, 2001. After the president announced Kuhl's nomination, Senator Barbara Boxer (D-CA) made clear her opposition, focusing largely on the nominee's previous involvement in the Solicitor General's Office and her role in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986). Boxer and left-wing groups believed that Kuhl would support abortion restrictions and, accordingly, sought to quash her nomination by returning a negative blue slip to Chairman Leahy. The nomination of California Representative Christopher Cox (D-CA) to the Ninth Circuit serves as another example. After President Bush nominated Cox to the court, word leaked out that both California Senators would oppose the nomination. The *Wall Street Journal* reported that Senator Boxer “immediately promised a blue slip.” And Senator Dianne Feinstein (D-CA) signaled her opposition to the nomination based, in part, on an article Cox wrote in 1992 endorsing judicial restraint (Gigot 2001).

Not only do ideologically distant Senators have *ex ante* motivations to obstruct presidential actions, they also are likely to be less persuadable by presidential side-payments, making them, again, more likely than other Senators to follow through with a negative blue slip. These members have the least amount to gain by supporting the President's larger legislative agenda and are unlikely to

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be “bought off” by the President. Moderate members may have a general policy incentive at times to engage in obstruction, but they will generally be cheaper for the President to buy off using side-payments. These side-payments could include nominating one of the Senator’s aides to another federal position, agreements to support other less-salient legislation, or the securing of pork-barrel projects for the member's district. Should a hold or blue slip become publicized, there may also be an electoral concern for centrists, as they often represent electorally competitive seats.

One such example where a moderate was bought off with side payments occurred in the 109th Congress (2005-2007). Senator Evan Bayh (D-IN) placed a hold on President Bush's nomination of Rob Portman as U.S. Trade Representative. Bayh had a reputation as one of the most conservative Democrats in the Senate. In exchange for releasing his hold on Portman's nomination, he wanted personal assurances from the nominee and the administration that they would work to address the growing trade deficit with China. In addition, Bayh asked for votes on legislation that penalized China for subsidizing its exports (Andrews 2005; Becker 2005). Portman and the administration assured Bayh that they would make these concessions, prompting the Indiana Senator to release the hold.

In sum, the data suggest that Senators ideologically distant from the President will be most likely to obstruct his nominations through the blue slip. Anecdotal evidence suggests the same. And political experience, fraught with compromise and side-payments, harkens towards ideological extremists being the most likely to employ the blue slip in a negative fashion. Thus we believe that as Senators become more distant ideologically from the President, they will be more likely to return negative blue slips. We also expect that members of the President’s party will be less likely to employ the blue slip negatively, since we anticipate that fellow partisans will benefit from supporting the President.

Our belief is guided by a number of considerations. First, fellow partisans are more likely to agree with the President's broader legislative agenda. Thus even if they disagree with a nominee ideologically, they may opt against obstructing that nominee in order to facilitate the passage of future legislation. Second, scholars of the U.S. House have demonstrated that fellow partisans are cheaper to buy off with side-payments than out-party members with similar ideologies (Binder, Lawrence and Maltzman 1999). Finally, by virtue of sharing the same party label (and electoral fates), members of the President's party are more likely to have a good working relationship with the executive and thus be closely consulted prior to the nomination. As they all benefit from the same brand name, these actors are likely, on average, to follow the President and, at least at times, hold their noses and move forward. In short, we expect that Senators from the President's party will be unlikely to return negative blue-slips.

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In addition to their independent effects, it is likely that policy interests and partisan interests interact with each other. Ideologically distant Senators will be less likely to be bought off by the president than ideological allies, to be sure, but when those distant Senators have a political interest in seeing the President suffer, they should be even less likely to make deals. That is, they will observe both policy-based and politically based reasons to obstruct the President. Thus we expect that as the ideological distance between an out-party Senator and the president increases, the Senator will be increasingly likely to return a negative blue slip.

Of course, policy and politics are not the only factors influencing Senators to return negative blue slips. Nominee qualifications also likely influence such decisions. More than a handful of nominees to the federal courts saw their dreams of sitting on the bench shattered by concerns about their judicial qualifications. G. Harrold Carswell's hopes of becoming a Supreme Court Justice were dashed when observers noted that he was overruled more than any other judge in his circuit. Indeed, Senator Roman Hruska (R-NE) wins the award for the feeblest attempt to improve perceived judicial qualifications when claiming, in support of Carswell: "Even if he is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they…?" (Epstein and Segal 2005).

Empirical evidence also shows the importance to Senators of nominee qualifications. Martinek et al. (2002), for example, find that nominees rated as more qualified are significantly more likely to be confirmed to both the circuit courts and district courts than nominees with low ABA grades. They also find that judges rated as highly qualified by the ABA take less time to confirm on both courts. Epstein and Segal (2005) and Cameron, Cover, and Segal (1990) show that perceived qualifications matter dearly to Supreme Court nominees. Senators overwhelmingly vote for nominees who are highly qualified. We likewise believe that perceived nominee qualifications will influence Senators' blue slip behavior. Holding all else equal, when a Senator perceives the nominee to be more qualified, he or she will be more likely to return a positive blue slip. Conversely, when the Senator perceives the nominee to be less qualified, he or she will be more likely to return a negative blue slip.

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

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decade earlier in 1997, they terminated 25,840 such cases. Indeed, as Brudney and Ditslear (2001, 568) show, the Supreme Court reviewed roughly 0.2% of circuit court decisions in 2000. Because circuit courts rule on many contemporary pressing issues and know that the Supreme Court reviews only a small percentage of their cases (and therefore rarely reverses them), circuit judges have broad discretion (Bowie 2009). As such, Senators are likely to return more negative blue slips when examining circuit court nominees.

We also control for a number of additional factors that might influence Senators to return negative blue slips. We first control for the amount of time left in the session. We expect that threats of obstruction will be more credible—and effective—later in each session, making the blue slip a more attractive option during this time-period (Binder and Smith 1997, Koger 2010, Oppenheimer 1985, Wawro and Schickler 2006). We likewise control for the popularity of the President. It is well documented, for example, that popular Presidents are more likely to enjoy legislative success (Binder and Maltzman 2004, Light 1999). Senators may be reticent to stand up publicly to popular Presidents. We might therefore expect that when public support for the President is high, Senators will actually turn to the (less-public) blue slip to oppose nominees. When, however, the President's public approval is low, Senators can publicly oppose the President with tools other than the more-private blue slip.

Data, Measures, Methods, and Results

To determine the conditions under which senators engage in obstruction through blue slipping, we analyzed every nomination to the federal district and circuit courts between the 107th (2001-2003) through 110th (2007-2009) Congresses, inclusive.[3] These are the only recent Congresses where comprehensive blue-slip data are available. Our unit of analysis is a Senator's blue-slip-per-nomination, that is, each Senator's blue-slip treatment of each home-state nomination. Our dependent variable equals 1 if a Senator returned a negative blue slip or failed to return the blue slip, 0 otherwise.

We code our independent variables in the following manner: *Senator's Ideological Distance from President* is the absolute value of the ideological difference between the Senator and the nominating President, using the first dimension Poole and Rosenthal common space scores (Poole and Rosenthal 2007). *Democrat Senator* equals 1 if the voting Senator was a Democrat and 0 if

[3] In 2001, Chairman Leahy and Ranking Member Hatch agreed to make blue slips public (Sollenberger 2010, 130). Yet, the Committee made public only the blue slips during the 107th (2001-2003) and 108th (2003-2005) congresses. http://www.justice.gov/archive/index-olp.html. Sollenberger (2010) was able to procure blue-slip data from the 109th (2001-2003) and 110th (2007-2009) Congresses privately from the Senate Judiciary Committee.

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Republican. To examine the interactive effect, we multiplied *Senator's Ideological Distance from President* with *Democrat Senator*. Our measure of perceived judicial qualifications comes from the ratings of the American Bar Association Standing Committee on the Federal Judiciary for each nominee.[4] We created a scale from 1-7, in which we ranked a nominee's qualifications. A *Nominee ABA Rating* of 1 means that a nominee was unanimously not-qualified, while a rating of 7 was unanimously well-qualified.

Table 1. Logistic Regression Model of a Senator's Decision to Return a Negative Blue Slip

Variables	Coefficient
Ideological Distance	4.22* (1.64)
Democrat Senator	-0.81 (1.59)
Democrat Senator * Ideological Distance	3.19 (2.42)
ABA Rating	-0.37* (0.14)
Circuit Court Nomination	1.65* (0.43)
Days Until End of Session	-0.01* (0.00)
Presidential Popularity	-0.02 (0.01)
Constant	-3.39* (1.09)
Observations	836
Log L	-159.62

*p< 0.05. Logistic regression model parameter estimates of whether a Senator returns a negative blue slip for a judicial nominee, 107th-110th Congresses. Coefficient estimates are maximum likelihood, and standard errors (in parentheses) are robust errors clustered on each of the 352 unique nominees in our data.

To code *Circuit Court Nomination*, we relied on the blue-slip data provided by the Judiciary Committee and coded a nomination to the circuit court as 1, 0 otherwise. We code *Days Until Session Ends* as the number of days

[4] See http://www.abanet.org/scfedjud/.

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between when the President makes his nomination and the end of the Senate's session. To determine the *President's Popularity at Nomination*, we visited Gallup's website and determined the President's popularity at the time he made the nomination. Since our dependent variable examines the dichotomous outcome whether a justice returns a negative blue slip, we estimate a logit regression model and test for statistical significance using robust standard errors clustered on the nominee.

We turn first to our main covariate, the interactive relationship between ideology and party. We argued that as an out-party Senator becomes more ideologically distant from the President, the Senator will become more likely to return a negative blue slip. The data agree. We find that ideologically distant out-party Senators are more likely to return negative blue slips. We observe further that the effect of ideology is confined to members of the minority in our data. Moreover, our results suggest that out-party moderates appear to be significantly less likely to return a negative blue slip than more ideologically extreme members.

Figure 1 illustrates. In it, we show the relationship between ideological distance on the x-axis and the predicted probability a Senator returns a negative blue slip on the y-axis. The solid line represents a nomination that was sent to a member of the President's party; the dashed line shows a nomination sent to a member of the out-party.[5] When a Senator is a member of the President's party, the probability that a negative blue slip is returned is essentially zero, regardless of the member's ideology. By contrast, as distance increases for a member of the *out-party*, we observe significant separation between the dashed and solid lines. This suggests in substantive terms that the effect of ideology is conditioned on the member's party affiliation.

Consider an out-party Senator who is the minimum distance from the president. We estimate only a 0.003 probability that this Senator will return a negative blue slip. In contrast, for a member who is the maximum distance from the President, we estimate a 0.49 probability that the Senator returns a negative blue slip. In other words, the probability that a Senator returns a negative blue slip changes from next to nothing to 50%, a result attributable to the interactive relationship between ideology and partisanship.

As far as our further controls are concerned, we find that Senators are more likely to blue-slip nominees with lower ABA ratings. They are more likely to blue-slip nominees to circuit courts. And they are more likely to blue-slip nominees near the end of the Senate's session. On the other hand, presidential popularity does not appear to influence significantly how Senators exercise their blue slips.

[5] Predicted probabilities calculated while holding all other variables to their mean or modal values.

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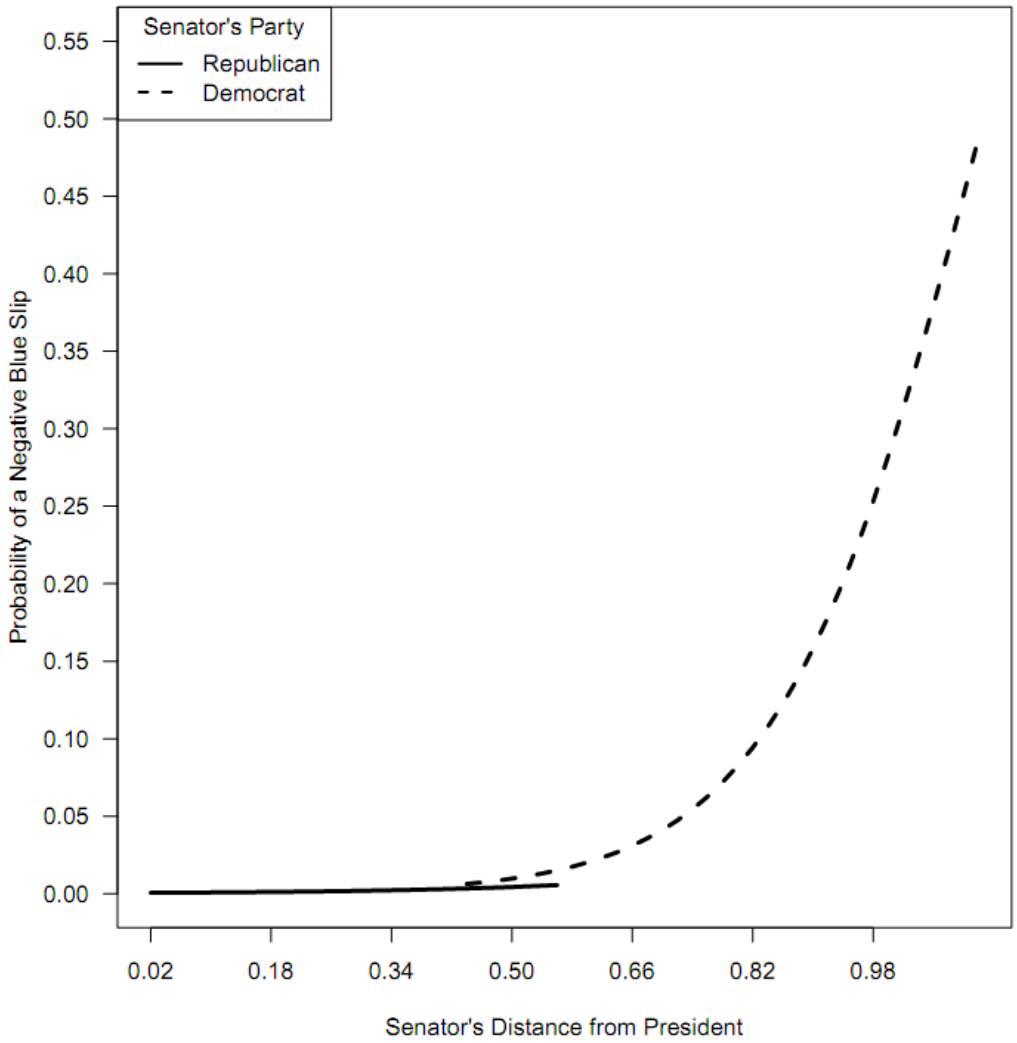
Figure 1. Probability a Senator Returns a Negative Blue Slip



Predicted probabilities calculated while holding all other variables to their mean or modal values. The solid line represents a nomination that was sent to a member of the president's party. The dashed line shows a nomination sent to a member of the out-party.

Conclusion

Observers of the U.S. Senate frequently argue that the growing use of obstructive tactics limits the chamber's ability to staff important vacant positions in the federal bureaucracy and judiciary, and to pass important pieces of legislation. Despite the frequency of this argument in the media, data limitations have

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prevented scholars from examining the issue systematically. In this manuscript, we have employed previously unreleased data to examine the link between Senators' ideologies and the obstruction of judicial nominees via the blue-slip procedure. Our data, while limited in time, provide insight into this question.

Specifically, our results suggest that obstruction is not utilized equally by members of the out-party. We find that the more extreme a member is ideologically, the more likely he or she is to return a negative blue slip. Despite a number of potential benefits, out-party centrists are less likely to engage in obstructive behavior. We suggest that this is because their ideological proximity to the President makes them more receptive to side-payments. On the other hand, partisanship uniformly trumps ideology among in-party Senators. At least in the period examined here, they did not blue-slip presidential nominees, whatever their own ideologies.

The modern Senate is strapped for time. With multiple agendas to pursue simultaneously, Senators must move through legislative business efficiently. The threat of obstruction from even a single Senator, however, can make legislative business untenable. Senators know this and employ their institutional prerogatives accordingly. Moreover, the judicial staffing problems about which Chief Justice Roberts recently warned are likely to continue as the two political parties become more polarized. Fewer judicial (and executive branch) vacancies are likely to be filled as more extreme challengers continue to take seats previously held by moderates. What this also means, inevitably, is that as moderate Senators continue to be replaced by more extreme members, the use of obstructive tactics in the modern Senate will continue to increase, and the consequences of those actions are likely to become more severe.

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