Competing Pivots in a Post-Filibuster Senate

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Abstract

Over the last few decades, policymakers and scholars have decried the use of filibusters to block lower federal court nominations. So, it was not a surprise when, in 2013, the Senate voted to eliminate the use of filibusters for judicial nominations other than those to the Supreme Court. But were filibusters the primary way senators actually blocked such judicial nominations? Our data suggest no. We provide the most exhaustive and precise data ever used to examine the judicial confirmation process. Our results suggest that the majority party median was more influential in affecting confirmation outcomes than were the filibuster pivots. They also suggest that even in the post-filibuster senate, senators can exploit other parliamentary procedures to block nominations.

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In November 2013, the U.S. Senate eliminated the use of filibusters for judicial nominations other than those to the Supreme Court. Some saw the move as a power grab by some Democratic senators to clear the way for Obama nominees to the federal circuits; others viewed it as a needed antidote for what had become a poisoned confirmation process. After the filibuster change, and while Democrats still controlled the Senate, seven of the thirteen judges confirmed in the 113th Congress received fewer than 60 yea votes. These appointments strongly suggest that the filibuster was a tool—if not the primary tool—to block or otherwise reject judicial nominations. But, just how responsible was the filibuster for killing nominations? Our data suggest that while the filibuster was indeed important, it may not have been the most critical obstacle in the judicial confirmation process—at least for circuit court nominees. Indeed, the results portend continued conflict even in a post-filibuster senate.

We employ the most precise data ever used to examine judicial confirmations and the separation of powers empirically. Our data suggest that for circuit court judges, the filibuster pivots were not the most pivotal actors in the senate; rather, between 1975 and 2015 the majority party median was the most powerful pivot when it came to confirming or killing nominations. In fact, the filibuster pivot was not even the second most influential pivot. That mantle went to a mixture of the median senator, the majority party median, and the Senate Judiciary Committee median. Thus, while the filibuster change clearly has important implications, the majority party retains extensive control over nominations.

This paper makes four contributions. First, as we stated above, we employ the most precise data ever used to examine judicial confirmation politics. Pivotal politics models require decision makers to rely on the location of the status quo to calculate their behavior. Yet existing studies often do not include the status quo in their empirical models. We do. For every single day between 1945 and 2015, we identified the active judges in each circuit and, thus, the status quo in those circuits. Doing so allowed us to make precise calculations about the status quo at the date of a circuit nomination. Our results suggest that failing
to include the status quo in fact leads to erroneous inferences. Second, and relatedly, we performed an exhaustive search to identify only those senators who served at the time of a nomination. We did so because if a senator leaves office during the middle of a Congress, the identities of many pivots change. And, relying on aggregate data about pivots per congress can lead to faulty estimates and conclusions. In our data, every time the president nominated someone to a circuit, we knew the identity of the precise pivots at that exact time. Third, we demonstrate who the most influential pivots were in the senate. While most of the literature and media attention focuses on the filibuster, other pivots are more influential. Finally, it is worth noting that we examine not only the most influential pivot over the entire time period, we also examine whether the key pivots changed over time. The data show that some pivots mattered more in certain eras than in others. And, importantly, our results show what pivots are most influential in the post-filibuster world.

**Senate Obstruction in the Judicial Appointment Process**

The judicial confirmation process is fraught with ambiguity. The constitution declares that “[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint” judges to the federal courts. Not surprisingly, given the constitution’s silence over what standards the Senate must employ when determining whether to consent (or whether it must proceed at all), the process gave way to controversy from its inception. As Stephen Carter put it: “We know that under Article II of the Constitution, the President nominates [federal judges] and, with the advice and consent of the Senate, appoints them.

1 The “advice” portion also generated controversy. In 1789, President Washington went to the Senate to seek its advice on an Indian Treaty. Rather than debate with the President, the Senate referred the matter to a committee, to which Washington responded: “This defeats every purpose of my coming here!” The Senate agreed to take up the treaty again the following week, and after it got embroiled in procedural debate, Washington huffed out of the Senate, claiming he would be “damned” if he ever went “there” again (Jones 2002, 119).
But we are not quite sure what anybody’s role is—the President’s, the Senate’s, or the public’s” (Carter 1994, 14). And wherever there is ambiguity in law and politics, there is conflict.

Factors such as ideology, partisanship, and nominee qualifications have contributed significantly to nomination failures. Looking at Supreme Court nominations, Epstein et al. (2005) find that when a Senator and nominee are distant ideologically, the probability a senator votes to confirm is a mere 0.24. Yet, when the two are ideologically aligned, the probability that senator votes to confirm skyrockets to 0.99 (see also Epstein et al. 2006; Shipan and Shannon 2003). Impeccable credentials, of course, can mitigate the negative effects of ideological distance. While circuit court nominations are less studied, it appears that similar dynamics apply there as well. For example, Binder and Maltzman (2002) find that ideology and partisanship effect the length of time each nominee awaits a senate decision. Ideologically distant home state senators during divided government appear to have considerable influence on the process (see also Goldman 2004). Scherer, Bartels and Steigerwalt (2008) focus on how interest groups raise the political and ideological stakes of lower court nominations. Black, Madonna and Owens (2014) show how senators ideologically distant from the president used their blue slipping privileges to obstruct judicial nominations.

When it comes to identifying which senators are the most influential in the confirmation process, Primo, Binder and Maltzman (2008) argue that circuit court nominations succeed or fail based largely on the location of the filibuster pivot. They found that as the size of that particular gridlock interval increased, confirmations of nominees become less likely. Yet the Primo, Binder and Maltzman (2008) study has critical limitations that restrict our ability to make inferences—restrictions due largely to the availability of data at the time of their study. First, the study examined whether a nominee’s success was a function of the size of the gridlock interval rather than whether the status quo fell within that interval. The essential logic of pivotal politics is that decision makers must be made better off than the status quo. Additionally, the study did not examine the identity of senators at
the time of the nomination. Rather, the study, like all other separation of powers studies, simply relied on data at the congress-level. This is important to note because throughout the years, senators have come and gone during each congress. Indeed, in the 111th Congress, 18 senators entered or left office between the start and end of the term, meaning the pivots in the chamber fluctuated over time. Since we desire to know the precise pivots at the time of the nomination we must examine the identity of the senators each day in our time period.

At any rate, it seems clear that partisan and ideological concerns with nominees (and with the president) manifested themselves in the filibuster and other obstructive tactics. Before the recent filibuster change, the Senate lacked a simple, majoritarian rule to issue restrictive floor rules and end debate. Small groups or individuals from either party could obstruct the legislative process. While three-fifths of the chamber could vote to invoke cloture and end that debate, the cloture process was (and remains) time consuming. The Senate frequently operates under unanimous consent agreements to manage routine chamber business. This, of course, requires party leaders to compromise with obstructive Senators. Due to the large number of nominations that require Senate approval and the importance of conserving time, majority leaders generally take filibuster threats seriously.

As they should. Modern senators used the filibuster regularly to block or otherwise obstruct judicial nominations. Some modern nominees were filibustered early and did not even receive a Committee hearing or a final up or down vote on the Senate floor. Nominations that made it to the floor wound up waiting longer than past nominations. Circuit court nominees in the 95th, 96th, and 97th Congresses waited (respectively) 21.2, 47.7, and 25.8 days for their hearings. But circuit court nominees in the 105th, 106th, and 107th Congresses waited (respectively) 230.9, 235.3, and 238.4 days for their hearings. In the face of this obstruction behavior, scholars declared the federal judicial appointment process a “mess” that was “broken” and in dire need of repair (Carter 1994; Cornyn 2003). The filibuster had become a tool that, though often used by both parties, was reviled.
The Birth and (Near) Death of the Filibuster

Filibusters have always existed in the Senate. They have applied not just to judicial nominations but to all forms of nomination and legislation. Prior to 1917, when the senate adopted Rule XXII, there was no mechanism to stop debate in the Senate, even in the face of but a single obstructionist. Rule XXII created a cloture mechanism by which a supermajority of 2/3 of voting senators in the Senate could vote to “place a time limit on consideration of a bill or other matter, and thereby overcome a filibuster,” (U.S. Senate 2016). While Rule XXII has existed since 1917, the specific vote thresholds, time limits, and substance to which it applies have been changed numerous times since its creation. Major modifications were made in substantive application, vote threshold, amendment threshold, or debate time limitations in 1949, 1959, 1975, 1979, and 1986. The most consequential of these changes was lowering the cloture threshold for bills and nominations from 2/3 of voting senators to 3/5 of all senators (voting or absent).

From 1986 to 2013, the Senate’s cloture mechanism in Rule XXII remained un- changed. Yet senators increasingly filibustered legislative items which, in turn, lead to an increasing amount of cloture votes. This expanded use of obstructionist tactics combined with substantial backlogs in the judicial confirmation process led to debate about whether the rule should be modified again. During this time the majority party in the Senate repeatedly faced minority party obstructions. With the exception of a brief Democrat supermajority from July 7, 2009 to February 4, 2010, the Senate lacked the ability to invoke cloture and end debate without assistance from minority party members.\(^2\)

\(^2\)The Democrat’s brief period of supermajority control began when a disputed Senate election in Minnesota between incumbent Norm Coleman (R) and challenger Al Franken (D) was resolved in Franken’s favor, and ended when Senator Scott Brown (R-MA) was sworn in following a special election in Massachusetts to fill the vacancy created by Senator Edward M. Kennedy’s death.
While changing Rule XXII to limit obstructionism appealed to the majority party, it would mean a tremendous loss of influence for the minority party (who, of course, would decry the tactic). Republican Senator Trent Lott (R-MS) is credited with coining the term “nuclear option” in March of 2003 in describing a plan to modify the rule to allow simple majority votes on judicial confirmations (Safire 2005). The term quickly spread and has since been commonly used to describe filibuster reforms. Proponents of filibuster reform, attempting to combat the negative connotations of the word, have attempted to replace it with the term “constitutional option.”

Figure 1 below shows the volume of media discussion of filibuster reform from 2001-2015.3 Discussion of possible reform peaked in 2005 during the George W. Bush administration, when the Republicans controlled the House, Senate and Presidency, but lacked a super-majority in the Senate. Adding to the Republican frustrations were three Supreme Court nominations that year (John G. Roberts, Harriet E. Miers, and Samuel A. Alito), which faced substantial scrutiny from the minority party. Ultimately, the Miers nomination was withdrawn, the Roberts and Alito nominations were successful, and the filibuster rule remained unchanged.

3Figure 1a shows the number of articles in the New York Times on the subject of filibuster reform from 2001 to 2015. This chart was created using the New York Times’ own topic tags that indicate the subject of the article, and then a secondary hand-coding to eliminate any unrelated articles. A similar search in Lexis-Nexis using related phrases produces broadly similar results, though the specifics vary somewhat depending on the search terms deployed.
Despite repeated majority party threats to curb filibuster abuse, the minority party managed to stave off such changes until 2013. Two major sets of filibuster reforms occurred in 2013. At the beginning of the 113th Congress, Democrat and Republican leaders negotiated and agreed upon a set of minor changes to the the implementation of Rule XXII. These rule reforms that were negotiated by party leaders were then voted on by the Senate, and passed by wide margins (78-16 and 86-9).

These minor bipartisan reforms to the cloture process did little to change the use of the filibuster. Consequently, the majority adopted another change. The first major

\[4\text{These changes included allowing the Senate majority leader to prohibit filibusters on the motion to consider a bill and blocking a filibuster on a motion to proceed if signed by 8 minority members and the minority leader. In exchange for these concessions, the minority was granted the right to two amendments, though this concession expired at the end of the 114th congress.}\]
change to the filibuster rule since 1986 occurred suddenly and with little debate several months later. On November 21, 2013 the Senate invoked the so-called “nuclear option” by voting 52-48 to eliminate the filibuster on executive branch nominees and judicial nominees with the exception of Supreme Court nominations. In practice, this change removes the supermajority threshold for most judicial nominations, which, for the first time in Senate history, will require only a simple majority to invoke cloture and move to confirmation.

Gridlock Intervals and the Judicial Appointment Process

That the filibuster has attracted negative and sustained attention is clear; less clear, however, is whether the filibuster was as responsible for sinking nominations as commonly believed. Did nominations suffer primarily at the hands of senators who could filibuster them? Was the filibuster to blame, as its antagonists argued? And what has happened in the aftermath of the recent filibuster change? To answer these questions, we must reexamine the five gridlock intervals (Primo, Binder and Maltzman 2008; Krehbiel 1998) involved in the confirmation process.

What all these models have in common is the argument that senators (and presidents) have incentives to move forward with nominations that will make policy that is better than the status quo. Conversely, they have incentives to reject nominations that will make worse policy than the status quo. All pivotal actors need to be made better off for the nomination to move forward.

Consider Figure 2. It includes a left pivot $L$ and a right pivot $R$. (The identity and location of these pivots are a function of the legislative models we discuss below.)

5To the substantial consternation of the minority party, this change was made by a “brute force approach” majority vote that reinterpreted the cloture rule to require only a majority to invoke cloture on the newly exempted nominations. See Smith (2014) for an extended discussion of this reform.

6All actors in the Figure have continuous, single-peaked, symmetric preferences on a unidimensional policy scale and prefer policy that is closest to their ideal points. They all
reflects the status quo policy location. That is, the status quo is the reversionary point—the policy that will exist if the senate rejects the nominee. $SQ_1$ falls between the left and right pivots while $SQ_2$ falls outside those pivots.

![Gridlock Interval Diagram](image)

Figure 2: Hypothetical gridlock interval. A nomination made when the status quo falls between the left and right pivots (e.g., $SQ_1$) is unlikely to succeed. A nomination made when the status quo falls outside the left and right pivots (e.g., $SQ_2$) is likely to succeed.

According to this general model, the senate would reject a nominee when the reversionary point is $SQ_1$ but would approve a nominee when the reversionary point is $SQ_2$. The logic is simple. Under condition $SQ_1$, any movement away from the status quo necessarily makes either the left or the right pivot worse off than the status quo. A nomination to the left of $SQ_1$ makes $R$ worse off, while a nomination to the right of $SQ$ makes $L$ worse off.$^7$ The pivotal senator who is being made worse off will use his or her institutional powers to block the nomination. For the nomination to move forward, both pivots need to be made better off (or, at least, not worse off). Under condition $SQ_2$, movement away from the status quo—and somewhere between $LR$, makes both pivots better off than the status quo. The senate will confirm a nominee under this condition.

While the model is simple in theory, identifying the left and right pivots is not.

$^7$technically, the president could nominate someone exactly at $SQ_1$, but it would be costly just to reaffirm the status quo. Moreover, it is unlikely that the president and pivotal senator(s) would agree on whether the nominee would exactly replicate the status quo.
The congressional literature presents a number of competing models to explain confirmation politics, and often, different members are pivotal in them. For our purposes, scholars have identified five different possible pivots. We discuss each below.

*Chamber Median Interval.* Proponents of the chamber median model contend that policy outcomes reflect the ideological preferences of the median legislators in the House and Senate (Krehbiel 1995; Riker 1962). Following standard median voter theorem arguments, the theory holds that in a unidimensional policy space with simple majority rules, policy outcomes tend to converge on the median’s position. In the confirmation context, this means that a nomination succeeds or fails as a function of the median senator’s wishes. That is, if the status quo falls between the median senator and the nominating president, the nomination is not likely to succeed. If, on the other hand, the status quo is more extreme than both the median senator and the president, the nomination is likely to succeed.

*Party Gatekeeping Interval.* Proponents of the party gatekeeping model argue that the majority party will exercise agenda control to pass only those policies that are favorable to the majority party’s reputation (Cox and McCubbins 2005). Under this view, leadership allows legislation to reach a floor vote only if it will make the majority party median and the chamber median better off than the status quo (Smith 2007). In the confirmation context, this means that a nomination succeeds or fails as a function of the majority party median’s wishes and the median senator’s wishes. That is, if the nomination will improve the status quo for both the majority party median and the chamber median, party leadership will allow it to move forward. If the status quo falls between the chamber median, party median, and president, however, the nomination will fail.

*Committee Gatekeeping Interval.* The committee gatekeeping model focuses on the power of committees to bottle up or report legislation to the chamber (Smith 1989). In most contexts, this means that, given an open rule for amendments, the committee will only open the gates when it is closer to the chamber median than to the status quo. The committee thus has the power to defend the status quo even if the chamber majority desires change
(Smith 1989). What this means in our context is that the median senator and Judiciary Committee median must be on board with the nomination. So, if the status quo falls between the median senator, the Judiciary Committee median, and the president, the nomination will fail. On the other hand, if the status quo falls outside those three pivots, the nomination is likely to succeed.

**Filibuster Interval.** As we discussed above, the filibuster pivot model specifies that the existence of the filibuster rule in the Senate acts as a significant obstacle in the legislative process, such that policies require the consent of the 60 senators necessary to invoke cloture and end debate (Krehbiel 1998). The relevant pivots under this model depend on political circumstances. In the confirmation context, for Democrat presidents, the left pivot is the the president while the right pivot is the 60th senator. (We assume senators will not filibuster nominees from presidents of their own parties.) For Republican presidents, the left pivot is the 40th senator and the right pivot is the president.

**Blue Slip Interval.** The blue slip account holds that the home state senators, regardless of whether they hail from the president’s party, can veto a nomination. A blue slip is a tool that home state senators can use to support or oppose a federal judicial nominee to a position in their state (Black, Madonna and Owens 2014). When the Senate receives a nomination to the lower federal courts, the Judiciary Committee Chair delivers a “blue slip”—a blue slip of paper—to the nominee’s two home state senators. Unlike the norm of senatorial courtesy, the blue slip is not limited to home state senators of the president’s party. If a senator returns a negative blue slip or fails to return the blue slip to the Chair, she shows opposition to the nomination. In that case, the Judiciary Chair is considerably less likely to move the nomination to a hearing. And while not dispositive, a negative blue slip decreases the odds of a successful nomination. Under this account, then, the key pivots are the home state senators, regardless of their party.

Which of these gridlock intervals best explains circuit court nominee confirmation success and failure? And which explains confirmation failures in the post-filibuster senate?
It is to these questions we now turn.

**Data and Measures**

We examine every nomination to the federal circuit court of appeals between 1945 and 2015. We captured these data from the Attributes of U.S. Federal Judges Database and the Federal Judicial Center. For each nomination, we identified the date of the judge’s nomination, the nominee’s home state, the senators from the nominee’s state, the name and political party of the president at the time of the nomination, and the nominee’s American Bar Association rating.

**Dependent Variable.** Our dependent variable—*Unsuccessful*—equals 1 if the senate did not confirm the nominee; 0 otherwise.

**Independent Variables.** Our covariates of interest reflect whether, at the time of the nomination, the existing status quo fell within each of the gridlock intervals we discussed above. Determining whether the status quo fell within each interval required a number of complicated and data-intensive steps.

First, we needed to determine the location of the status quo. To do so, we determined the identity and ideal point estimates of all active circuit court judges sitting *at the time of the nomination*. That is, at the time of each nomination, we identified every active judge on the circuit. We then calculated the median Judicial Common Space score from among those judges (Epstein et al. 2007). For each nominee, we then calculated a measure of the status quo, which was the median judge from among all active judges on the circuit at the date of the nomination.

Second, we needed to identify the leftmost and rightmost pivots. This, also, was no easy task. Senators come and go during each session of congress. Some die in office; some retire; others are defeated in primary elections or general elections.

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8 [http://artsandsciences.sc.edu/poli/juri/attributes.htm](http://artsandsciences.sc.edu/poli/juri/attributes.htm)


10 [http://epstein.wustl.edu/research/JCS.html](http://epstein.wustl.edu/research/JCS.html).
others leave for different posts. When this happens, some of the pivots change. For example, the median senator is not often the same person throughout a session. And if one relied on simple measures to locate the key pivots, one might arrive at erroneous conclusions. Thus, we took the time to determine the dates during which every single senator in our dataset served. We determined their start dates and their end dates. In many congresses, particularly early on numerous vacancies occurred and had to be filled. So, we looked to the date of every nomination. Then, we determined which precise senators sat in office on that date. Looking only at the senators serving on that date, we identified each of our pivots.

We then identified the first dimension DW-Nominate scores (Carroll et al. 2015) of those pivots. It bears repeating, we think, that our approach uses more precise measures of the pivots than any existing study—and we plan to publish those data with this paper. For each of the models, the right pivot is the maximum of the listed senators and the president. The left pivot is the minimum of the same set. The exception is the pure filibuster model which requires one pivot to be the president and the opposite pivot to be the pivotal filibuster on the opposite side, under the assumption that a president’s party will not filibuster his nominees.\footnote{A naive filibuster model performs slightly worse, without changing rank order.}

In short, after we calculated the status quo for each circuit at the date of each nomination, we determined whether that status quo fell within each of our relevant gridlock intervals. If so, we coded the gridlock interval variable as 1; 0 otherwise.

We also control for the nominee’s qualifications score. Following Primo, Binder and Maltzman (2008), we created a binary indicator called \textit{Well Qualified}, which equals 1 if the American Bar Association rated the nominee as well qualified or exceptionally well qualified; 0 for qualified or not qualified nominees.

Before we proceed, we should pause to remind the reader what our goals are. First, we want to determine whether the filibuster pivots were the most influential pivots throughout our sample period, or whether other pivots in the senate were more influential. Second, we
aim to identify the most influential pivots in the post-filibuster senate.

**Methods and Results**

Because our dependent variable is binary, we estimated logistic regression models. We considered 13 possible combinations of pivotal senators, each of which come from the models used by Primo, Binder and Maltzman (2008). Table 1 presents the results for each of the models. Each model regresses *Unsuccessful* on whether the nomination occurred under a particular gridlock interval. In each model, we also controlled for whether the nominee was *Well Qualified*.\(^\text{12}\)

**Table 1: Regression Estimates of Gridlock Interval Models**

<table>
<thead>
<tr>
<th>Model Description</th>
<th>Coef</th>
<th>Std Error</th>
<th>p</th>
<th>BIC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Median, Majority Median</td>
<td>0.76</td>
<td>(0.16)</td>
<td>0.00</td>
<td>944.12</td>
</tr>
<tr>
<td>Median, Majority Median, Committee</td>
<td>0.70</td>
<td>(0.17)</td>
<td>0.00</td>
<td>947.61</td>
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<tr>
<td>Majority Median, Filibusters</td>
<td>0.74</td>
<td>(0.19)</td>
<td>0.00</td>
<td>949.88</td>
</tr>
<tr>
<td>Majority Median, Blue Slips, Filibusters</td>
<td>0.74</td>
<td>(0.19)</td>
<td>0.00</td>
<td>949.88</td>
</tr>
<tr>
<td>Majority Median, Filibusters, Committee</td>
<td>0.72</td>
<td>(0.19)</td>
<td>0.00</td>
<td>950.63</td>
</tr>
<tr>
<td>Median, Committee</td>
<td>0.57</td>
<td>(0.16)</td>
<td>0.00</td>
<td>953.09</td>
</tr>
<tr>
<td>Filibuster Pivots</td>
<td>0.60</td>
<td>(0.17)</td>
<td>0.00</td>
<td>953.87</td>
</tr>
<tr>
<td>Median</td>
<td>0.41</td>
<td>(0.16)</td>
<td>0.01</td>
<td>959.48</td>
</tr>
<tr>
<td>Median, Blue Slips, Committee</td>
<td>0.45</td>
<td>(0.18)</td>
<td>0.01</td>
<td>959.75</td>
</tr>
<tr>
<td>Median, Majority Median, Blue Slips</td>
<td>0.46</td>
<td>(0.19)</td>
<td>0.02</td>
<td>960.08</td>
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<tr>
<td>Median, Blue Slips</td>
<td>0.40</td>
<td>(0.18)</td>
<td>0.02</td>
<td>960.97</td>
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<td>Majority Median, Blue Slips, Committee</td>
<td>0.43</td>
<td>(0.19)</td>
<td>0.03</td>
<td>961.02</td>
</tr>
<tr>
<td>Filibusters, Blue Slips, Committee</td>
<td>0.34</td>
<td>(0.20)</td>
<td>0.10</td>
<td>963.38</td>
</tr>
</tbody>
</table>

*Note:* Table entries are logistic regression estimates with classical standard errors. The dependent variable represents whether the nomination failed (=1) or succeeded (=0).

All but one of the models are statistically significant at the 95% level and all are correctly signed. We use the Bayesian Information Criterion (BIC) to compare models.\(^\text{13}\) The best fitting model is the one with the smallest BIC value. The best performing model is the party gatekeeper model, which includes the president, the median senator, and the

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\(^{12}\) Our results are the same if we omit this control variable.

\(^{13}\) Each model has the same number of variables, so the Akaike Information Criterion (AIC) is functionally equivalent.
majority party median. The next four highest performing models each also include the majority party median. These results strongly support the importance of the majority party’s gatekeeping functions.

The overarching importance of the majority median is a substantial departure from past work. The data suggest that the most limiting institutional barrier to confirmation is the majority’s control over the process. According to our models, a well qualified nominee to a circuit with a status quo inside the majority party gatekeeping gridlock interval has a 40.8% chance of failing to be confirmed. A well qualified nominee to a circuit with a status quo outside the window has a 25.7% chance of failing to be confirmed, for a marginal effect of 16.1%. For the sake of comparison, the marginal effect of moving from not well qualified to well qualified, while staying inside the window is only a 6.2% lower chance of an unsuccessful nomination.

Our data also allow us to analyze which pivots are most influential in different time periods—including the post-filibuster senate. We refit the three best-fitting models to 10-year subsets of our data and again compared their BIC scores. Figure 3 plots which model performed best over time. Each circle is the model that has the lowest BIC score for a given 10 year window. This plot does not show the relative differences in model performance, only which of the three is ranked first. Circles on the bottom line are the party gatekeeper model (pivots: president, median, majority median). Circles in the middle are the blue slip model (pivots: president, home state senators, committee median). Circles on the top line are our specified filibuster model (pivots: president and opposite filibuster).
One immediate takeaway is that the ranks change often between different time periods. The majority party gatekeeper has been the best fitting model for most of the past 30 years, but before that, the filibuster was more important. This change in importance from filibuster model to party gate-keeping model coincides with the lowering of the cloture threshold from 2/3 to 3/5 in 1975. Year to year changes in rank should not be over-interpreted, but the overall trend is clear. The filibuster appears not to have been as powerful in recent decades as commonly believed. Partisan control over the judicial confirmation process in the Senate increased somewhere in the early 1980s. Further analysis on the occasional importance of blue slip senators could allow us to determine with greater precision how different Judiciary Committee chairs treated the blue slip procedure.

**Moving Forward**

These data provide the opportunity to explore related hypotheses about responses to judicial vacancies. We have a way of exploring how well different models fit over time. That will allow us to identify the historical moments when different procedural hurdles acted as the limiting factor to judicial confirmations. One possibility is to compare the tenure of Judiciary Committee chairs to the performance of the blue slip model to identify the chairs who paid the most deference to the blue slip procedure.

Of further interest is a general question of the importance of institutional rule changes
versus norm changes. Our time series includes two major changes to filibuster rules. In 1975, the super-majority required to invoke cloture was reduced from 2/3 to 3/5. Later, in 2013, the Senate eliminated the filibuster for judicial nominees, a change that, in part, prompted this project. Additionally, other changes of varying significance were instituted in 1949, 1959, 1979, and 1986. Our data give us a unique opportunity to determine which, if any, of these reforms had substantive effects on the nominating process. Complicating the issue is the question of how changes to Senatorial norms might alter behavior without formal rule changes. As discussed above, Trent Lott is credited with coining the term “nuclear option” in 2005, 8 years before the change was enacted. All subsequent moves on judicial nominees took place in a world where the majority party theoretically had the option to eliminate the filibuster. Moving forward, we intend to contrast public discussion of rule changes (drawing on the data in Figure 1) against the formal institution of those changes to determine whether the functionality of the Senate more closely follows norms or formal rules.

One behavior of interest that the analysis above does not address is the strategic selection of nominees by the president. Each of the models controls for whether the ABA rated a nominee as “Well Qualified,” under the expectation that pivotal senators will sometimes allow for unfavorable changes to a court’s makeup if a judge is particularly qualified. Presidents, knowing this, might feel the need to nominate very qualified judges when they know Senate makeup is not favorable. Conversely, they might be willing to nominate their preferred ideologues when they know they have an advantage in the Senate, leading to less qualified nominees. Tentative results weakly support this hypothesis. Figure 4 shows the change from the year before a midterm election to the year after in percentage of nominees rated “Well Qualified” plotted against the change in the raw size of the naive filibuster window (the gridlock interval bounded by the left and right filibuster pivots). Change over individual elections is a preferable measure to simply comparing ABA scores to the size of a gridlock interval because the way in which the ABA grades judges varies over time. By looking at the years directly before and after an election or other sudden change in gridlock
interval size, we can eliminate long-term trend effects.

Figure 4: Exploring strategic selection of nominees by president and potential valence-ideology trade-offs.

Table 2 below shows the bivariate regression of the impact of the filibuster window change on the well-qualified change in midterm elections. The relationship is not significant at conventional levels, but is suggestive. It appears plausible that presidents strategically nominate better qualified judges when senatorial conditions are not advantageous.

|                                    | Estimate | Std. Error | t value | Pr(>|t|) |
|-----------------------------------|----------|------------|---------|----------|
| (Intercept)                       | -0.0281  | 0.0673     | -0.42   | 0.6822   |
| Filibuster Window Change          | 0.7583   | 0.6376     | 1.19    | 0.2541   |

Our data will give us the chance to take a more careful look at when and how presidents take this sort of consideration into account. Going beyond ABA scores over midterm elections, we will look at other valence measures such as Law School rank and years of judicial service, as well as identity issues of race and gender. We can also consider other sudden shocks to the size of various gridlock window models, such as institutional rule changes or change in partisan control following party switches.
Presidential strategic selection provides a partial explanation for the relative weakness of the filibuster models in our results. Presidents can nominate sufficiently qualified candidates to secure 60 votes on a cloture motion, but the majority party can still use more subtle gate-keeping methods to slow down and ultimately defeat nominations.

Conclusion

Competing models of the institutional structure of the Senate leave open the question of where pivotal power resides. Our data suggest that in the case of nominations to federal circuit courts, partisan control runs deep. Unqualified nominees can be blocked or slowed by filibuster, blue slip, anonymous hold, or other institutional methods, but the crucial limiting factor is the ideology of the majority party. If the status quo ideology of the relevant circuit court is inside an interval bounded by the president, the median senator and the majority party median, a nominee sees her chance of confirmation drop by 16 percentage points. Crucially, that model includes nothing about the nominee’s own ideology. Factors entirely outside of the nominee’s control dictate a substantial portion of her likelihood of confirmation.

In the wake of Supreme Court Justice Scalia’s death, the question of what leads a judicial nominee to be confirmed or rejected will likely be salient in the public mind. Our analysis suggests that even a very qualified nominee might face significant hurdles to confirmation.\textsuperscript{14} There is a large amount of ideological distance between President Obama and the Republican Senate majority, enough that the status quo of the current Supreme Court likely falls inside the gridlock interval. Absent a salient Supreme Court nomination fight, the issue of judicial confirmations does not go away. Despite changes to the filibuster

\textsuperscript{14}An important caveat is that our analysis is based on an analysis of the confirmation politics of Circuit Court nominees rather than Supreme Court nominees, thus the political stakes may be somewhat lower in our cases. In addition, the 3/5 cloture rule remains (at present) unchanged for Supreme Court nominations.
rules that should remove one procedural hurdle to confirmation, our analysis casts doubt on expectations of substantial improvement in the rate at which judges are confirmed.
References


