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R STREET SHORTS NO. 68
March 2019

UNDERSTANDING THE BLUE SLIP DEBATE

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INTRODUCTION

Article II, Section 2 of the Constitution gives the president the power to nominate federal judges “by and with the advice and consent of the Senate.”¹ As part of its advise and consent role, the Senate has adopted a custom of sending a blue-colored form—known as a “blue slip”—to the two senators of a given nominee’s home state to seek their opinion of the president’s nomination.

Judicial confirmations have been a cornerstone of President Donald Trump’s agenda. And, with a Republican-controlled Senate, the president has been widely successful in filling judicial vacancies across the federal judiciary. As a result, the blue slip’s role in judicial confirmations has gained renewed interest. Senate Democrats argue that Republicans are ignoring the historical application of blue slips by pushing nominees through the judiciary committee over the objections of one or both of a nominee’s home-state senators. Republicans claim their approach is consistent with traditional practice. The truth is somewhere in between. Ultimately, the Senate’s current consideration of blue slips allows the judiciary to operate at fuller capacity but limits the input of home-state senators, potentially spurring future political retaliation.

A BRIEF HISTORY OF THE BLUE SLIP

The blue slip is an uncodified Senate tradition. As such, various chairs of the Senate Judiciary Committee have treated their influence differently. According to the Congressional Research Service: “From the 65th through the 84th Congresses, no chair of the Judiciary Committee allowed any negative blue slips to automatically veto a nomination.”² The policy changed, though, when Sen. James Eastland (D-Miss.) became chair of the committee in 1956. During his tenure from 1956 to 1978, a nominee needed a positive blue slip from each of his or her home-state senators before advancing through the committee.³

The policy changed again under Sen. Edward Kennedy’s (D-Mass.) tenure as chair from 1979 to 1981. Under Sen. Kennedy, an unreturned (or even negative) blue slip would not necessarily end a nomination. Chairman Sen. Strom Thurmond (R-S.C.) followed a similarly lenient policy in practice from 1981 to 1987, as did Chairman Sen. Joe Biden (D-Del.) from 1987 to 1995.⁴

In 2001, then-Chairman Sen. Patrick Leahy (D-Vt.) returned to Sen. Eastland’s threshold, requiring two positive blue slips for a nominee to advance through the committee.⁵ But during Sen. Orrin Hatch’s second tenure as chair in 2001, and in his third tenure from 2003 to 2005, he returned to the policy used previously by both he and Sen. Biden, not allowing the lack of two positive blue slips to automatically veto a nomination.⁶ And then from 2005 to 2007, Chairman Arlen Specter (R-Pa.) followed Sen. Leahy’s policy in practice, which changed the blue slip’s role once again.⁷

Sen. Leahy continued his two-positive-blue-slip standard when he returned as chair from 2007 to 2015, and from 2015 to 2016, Sen. Chuck Grassley (R-Iowa) followed suit.⁸ In 2017, though, Sen. Grassley reversed course and allowed some circuit judge nominations to proceed, even though all blue slips were unreturned. The blue slip threshold nevertheless remained for district judge nominations.⁹

CURRENT DEBATE IN CONTEXT

In early 2019, new Senate Judiciary Committee Chairman Lindsey Graham (R-S.C.) announced a blue slip policy purportedly similar to Sen. Grassley’s last one: Two positive blue slips would be necessary for district judges, while no returned blue slips would be needed to advance circuit judge nominations.¹⁰

Many Democrats have criticized the Grassley/Graham approach. They note, for instance, the difference in policy between the Obama and Trump administrations. Under Obama, both Sens. Leahy and Grassley followed the same two-blue-slip requirement.¹¹ However, in 2017, after the inauguration of President Donald Trump, Sen. Grassley set

hearings for circuit court nominees despite the objections of home-state senators.

Democrats also argue that the current approach is unprecedented. In February 2019, for example, the Senate confirmed a Ninth Circuit nominee over the objection of two home-state Senators. This was widely reported as the first known time that the Senate confirmed a judicial nominee that had not been approved by either home-state senator.¹² Since then, the Senate Judiciary Committee has sent additional circuit court nominees to the Senate floor without the approval of either home-state senator.¹³ This, Democrats argue, is an unprecedented violation of the blue slip tradition.

Some Republicans suggest that critics are failing to properly contextualize the tradition. First, they argue that for the majority of its history, the blue slip did not serve as a recognized veto of circuit judge nominees. As noted above, from 1917 to 1955, blue slips did not prevent committee action on a nominee. Similarly, from 1979 until 2001, one negative blue slip would not necessarily end a judicial nomination.

Although recent confirmations of circuit court nominees over the objection of both home-state senators are unprecedented, in the past, several chairmen have tried to push nominees through committee in similar ways. In 1985, for example, Hawaii Senators Daniel Inouye (D-Hawaii) and Spark Matsunaga (D-Hawaii) opposed one of President Ronald Reagan's Hawaii district judge nominations. Sen. Thurmond nevertheless went forward and held a hearing. (The committee, though, never voted on it.¹⁴) In 2003, Sen. Hatch held a hearing for one of President George W. Bush's nominees to the Sixth Circuit Court of Appeals, even though both Michigan Sens. Carl Levin (D-Mich.) and Debbie Stabenow (D-Mich.) returned negative blue slips.¹⁵ (The nominee—Henry Saad—eventually withdrew his nomination.¹⁶)

Republicans also argue that the debate surrounding blue slips has only become more contentious due to the end of the judicial filibuster for circuit and district court nominees, which Senate Democrats ended in 2013.¹⁷ As observed by political scientist Sarah Binder, blue slips were less relevant “when senators could filibuster judicial nominations on the Senate floor.” But now, “[w]ith neither the blue slip nor the judicial filibuster, minority Democrats can no longer block judicial nominees unless [...] GOP senators cross the aisle to help defeat them.”¹⁸ Accordingly, many Republicans see objections to the blue slip policy as having more to do with politics than norms.

POTENTIAL CONSEQUENCES

Much of the current debate surrounding blue slips concerns historical perspective. For the majority of the blue slip's history, it has not served as a recognized veto of judicial nomi-

nees. Nevertheless, it is also true that the current policy of regularly allowing nominees to proceed over the objection of both home-state senators is a deviation from tradition.

At any rate, the current policy may result in several consequences. For instance, the diminished role of blue slips in circuit court nominations may lessen the ability of home-state senators to consult and have good-faith negotiations with the White House regarding nominations. As a result, in situations where different parties control the Senate and White House, the blue slip policy may be cited as a justification to amend Senate or committee rules to stifle Executive Branch nominations.

On the other hand, the current policy does help advance nominees more quickly through the Senate and limit the impact of nationwide judicial vacancies. After all, widespread judicial vacancies cause real-world harm. Case backlogs and adjudicative delays raise unfair legal uncertainties and impose numerous hardships on businesses and individuals. Indeed, as one legal commentator argues: “A judge's politics will make a difference in only a tiny fraction of cases, but her presence on the bench will make a huge difference in terms of resolving cases expeditiously.”¹⁹

This rationale, though, may soon be moot. As of mid-March, there were over 150 judicial vacancies around the country, but only 11 in the Court of Appeals, where positive blue slips are no longer required.²⁰ The vast majority of vacancies lay in the district courts, where two positive blue slips are still required for advancement through committee. As a result, unless blue slip requirements end for district nominations, the largest number of vacancies in the federal judiciary will remain blocked by a negative one.

CONCLUSION

Blue slips are an informal tradition and courtesy to the senators of a judicial nominee's home state. Historically, they were not always recognized as judicial vetoes, but the current approach of regularly advancing nominations over the objections of both home-state senators is a deviation from traditional Senate practice.

As with most things, there are advantages and disadvantages to this new approach. On one hand, it streamlines the confirmation process, helps fill long-standing judicial vacancies and expeditiously alleviates overburdened federal courts. On the other hand, it may encourage frustrated senators to stall district court nominations, where positive blue slips are still required. The current approach may also encourage future committee chairs to abandon the blue slip tradition altogether, depriving—in conjunction with the end of the judicial filibuster—home-state senators' influence over judicial nominations in their states.

Going forward, senators and future chairs of the Senate Judiciary Committee should carefully consider how the fall of blue slips—and other Senate practices—may diminish senatorial courtesy and potentially alter the Senate’s ability to provide “advice and consent.”

ABOUT THE AUTHOR

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ENDNOTES

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4. *Ibid.*, pp. 10-14.
5. Barry J. McMillion, *The Blue Slip Process for U.S. Circuit and District Court Nominations: Frequently Asked Questions*, Congressional Research Service, Oct. 2, 2017, p. 4. <https://fas.org/sqp/crs/misc/R44975.pdf>.
6. *Ibid.*, pp. 10-11.
7. *Ibid.*, p. 5 n.26.
8. *Ibid.*, p. 4.
9. See, e.g., Seung Min Kim, “Grassley rips up ‘blue slip’ for a pair of Trump court picks,” *Politico*, Nov. 16, 2017. <https://www.politico.com/story/2017/11/16/chuck-grassley-trump-court-picks-245367>.
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