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The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present

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Summary

The blue-slip process had its genesis in the Senate tradition of senatorial courtesy. Under this informal custom, the Senate would refuse to confirm a nomination unless the nominee had been approved by the home-state Senators of the President's party. The Senate Committee on the Judiciary created the blue slip (so called because of its color) out of this practice in the early 1900s. Initially, the blue slip permitted Senators, regardless of party affiliation, to voice their opinion on a President's nomination to a district court in their state or to a circuit court judgeship traditionally appointed from their home state. Over the years, the blue slip has evolved into a tool used by Senators to delay, and often times prevent, the confirmation of nominees they find objectionable. The following six periods highlight the major changes that various chairmen of the Judiciary Committee undertook in their blue-slip policy:

- From 1917 through 1955: The blue-slip policy allowed home-state Senators to state their objections but committee action to move forward on a nomination. If a Senator objected to his/her home-state nominee, the committee would report the nominee adversely to the Senate, where the contesting Senator would have the option of stating his/her objections to the nominee before the Senate would vote on confirmation.
- From 1956 through 1978: A single home-state Senator could stop all committee action on a judicial nominee by either returning a negative blue slip or failing to return a blue slip to the committee.
- From 1979 to mid-1989: A home-state Senator's failure to return a blue slip would not necessarily prevent committee action on a nominee.
- From mid-1989 through June 5, 2001: In a public letter (1989) on the committee's blue-slip policy, the chairman wrote that one negative blue slip would be "a significant factor to be weighed" but would "not preclude consideration" of a nominee "unless the Administration has not consulted with both home state Senators." The committee would take no action, regardless of presidential consultation, if both home-state Senators returned negative blue slips.
- From June 6, 2001, to 2003: The chairman's blue-slip policy allowed movement on a judicial nominee only if both home-state Senators returned positive blue slips to the committee. If one home-state Senator returned a negative blue slip, no further action would be taken on the nominee.
- 2003: A return of a negative blue slip by one or both home-state Senators does not prevent the committee from moving forward with the nomination — provided that the Administration has engaged in pre-nomination consultation with both of the home-state Senators.

The blue-slip process has been the subject of growing scholarly and legal debate; a selected list of reading material is included at the end of this report.

This report will be updated to reflect future blue-slip policy developments.

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Introduction

The Judiciary Committee's blue-slip policy has been a central component in its confirmation of judicial nominations. For a large portion of its history, the blue slip gave Senators the ability to determine the fate of their home-state judicial nominations. If a home-state Senator had no objection to a nominee, a blue slip would be returned to the chairman with a positive response. If, however, the Senator had some objection to the nominee and wanted to prevent confirmation, he/she could decide not to return the blue slip or return it with a negative response. Over the years, the blue-slip policy has been modified to prevent a single Senator from having such absolute power over the fate of home-state judicial nominees. Today, a blue slip can stop a judicial nomination only if both home-state Senators return a negative blue slip and then only if the President has failed to consult with the home-state Senators.

This report provides a history of the Judiciary Committee blue-slip custom, a practice which emanated from the chamber's tradition of senatorial courtesy. It first defines "senatorial courtesy" and how the practice is related to the Judiciary Committee's use of the blue slip. Next, this report describes the creation of the blue-slip procedure and the modifications to it. Eight sections profile the committee's blue-slip policies during the last 43 Congresses. These profiles provide a sense of the stated and practiced blue-slip policy at any given time and place that policy in the context of the history of the blue-slip system. Case studies are provided to show how a particular Congress applied the blue-slip policy to a given circumstance. Finally, a frequently asked questions section and a concluding analysis on the blue-slip process are included.

It should be noted that there are currently two kinds of blue slips used by Congress. The Senate version of the blue slip[1] is a committee practice employed solely by the Senate Judiciary Committee for use in the confirmation of federal judges and other positions. In the House of Representatives, the blue slip is an enforcement tool for the Origination Clause of the U.S. Constitution.[2] CRS Report

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[1] For a further discussion of blue slips, see two articles by Brannon P. Denning, "The 'Blue Slip': Enforcing the Norms Of The Judicial Confirmation Process," *William & Mary Bill of Rights Journal*, vol. 10, Dec. 2001, pp. 75-101; and "The Judicial Confirmation Process and the Blue Slip," *Judicature*, vol. 85, May-Apr. 2002, pp. 218-226.

[2] Article I, Section 7, clause 1, of the U.S. Constitution states, "All bills for raising revenue

(continued...)

RS21236, *Blue-Slipping: The Origination Clause in the House of Representatives*, by (name redacted), discusses the use of the House version of the blue slip.[3]

Senatorial Courtesy

The blue slip is a manifestation of senatorial courtesy. A layman's definition of senatorial courtesy would be the deference with which one Senator treats another. In the context of the constitutional responsibility of advice and consent, the term and practice are more expansive. The *American Congressional Dictionary* defines senatorial courtesy as

> [t]he Senate's practice of declining to confirm a presidential nominee for an office in the state of a senator of the president's party unless that senator approves. Sometimes called "the courtesy of the Senate," the practice is a customary one and not always adhered to. A senator sometimes invokes the custom by declaring that the nominee is personally obnoxious or personally objectionable to him.
>
> ... [The Senate] also usually complies with a senator's request for a temporary delay in considering a nomination, a request that is referred to as a hold.[4]

The concept of senatorial courtesy goes beyond the confines of the Senate and, at times, represents the courtesy a President extends, or arguably should extend, to Senators. Political scientist Harold Chase describes the political ramifications of this Senate tradition:

> Senators, whether chosen by state legislatures, as they were at an earlier time, or by the voters of the state, must continuously nurture their political support back home; that is, if they hope for additional terms in office — and it is a rare senator who does not. In this connection, senators from the First Congress on have recognized that one or two senators have a much greater stake in a particular appointment than others. It is, of course, exceedingly helpful to a senator to be able to reward supporters with good posts in the federal government. Conversely, it is enormously damaging to a senator's prestige if a president of his own party ignores him when it comes to making an appointment from or to the senator's own state. What is even more damaging to a senator's prestige and political power is for the president to appoint to high federal office someone who is known back home as a political opponent to the senator. It was easy for senators to see that if they joined together against the president to protect their individual interests in appointments, they could to a large degree assure that the

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[2](...continued)
shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills."

[3] See also CRS Report RL31197, *Revenue Measures in Congress: Procedural Considerations*, by (name redacted); and CRS Report 31399, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement*, by (name redacted).

[4] Walter Kravitz, *Congressional Quarterly's American Congressional Dictionary*, 3rd ed., (Washington: CQ Press, 2001), p. 231. See also p. 116 for definition of "hold."

> president could only make such appointments as would be palatable to them as individuals. Out of such considerations grew the custom of senatorial courtesy.[5]

Although the custom of using the "personally obnoxious" or personally objectionable" declaration has fallen out of use in recent years, various chairmen of the Senate Judiciary Committee have used the blue-slip practice as a means of providing Senators with the opportunity to make objections to nominations formally known within the committee.

Methodology in Preparing the History of the Blue Slip

The following account of the history of the blue slip reflects research in the National Archives and Records Administration (NARA) in Washington, D.C.[6] The primary records researched were the executive nominations files from the 56th through the 83rd Congresses (1899-1953) and the correspondence and communications files of the Senate Judiciary Committee during the same Congresses.[7]

Scholarly studies as well as newspaper accounts of the origination of the blue-slip process were also used. Most accounts placed the creation of blue slips as having occurred during the Eisenhower Administration: the 83rd through the 87th Congresses (1953-1961).[8] Therefore, the research began in that time period and then worked back through the Congresses until no blue slips were found.

Collection of archival records and data focused on locating blue slips for each Congress and any personal correspondence between or among Senators relating to their use. The correspondence files contained no information on blue slips. Blue slips were, however, found for every Congress starting with the 65th (1917-1918) through the 83rd (1953-1954). Although there were no blue slips for the 64th Congress (1915-1916), research was conducted as far back as the 56th Congress (1899-1900). During this 15-year time period, no mention or evidence of blue slips

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[5] Harold W. Chase, *Federal Judges: The Appointing Process* (Minneapolis: University of Minnesota Press, 1972), p. 6.

[6] Research dates were from Jan. 23 through Feb. 3, 2003.

[7] National Archives and Records Administration, Record Group 46, Records of the U.S. Senate, 56th-83rd Congresses, Records of Executive Proceedings, Nomination Files and Correspondence and Communications Files, Judiciary Committee, Blue Slips (1917-1953).

[8] In a 1979 memorandum, Judiciary Committee staff stated "[t]he blue slip has been in use for over 25 years." See memorandum to Senator Edward M. Kennedy from Judiciary Committee Staff regarding senatorial courtesy, Jan. 22, 1979, cited in U.S. Congress, Senate Committee on the Judiciary, *The Selection and Confirmation of Federal Judges: Hearings Before the Senate Committee on the Judiciary*, Part I, 96th Cong., 1st sess. (Washington: GPO, 1979), pp. 118-119. In addition, a legal scholar asserted, "the 'blue slip' was invented in the Eisenhower era" (cited in Michael D. Schattman, "Picking Federal Judges: A Mysterious Alchemy," *Michigan Law Review*, vol. 96, pp. 1578-1597).

was discovered. The information collected permits a more accurate history of the blue slip in the Judiciary Committee, correcting the widespread belief that the blue-slip process originated in the 1950s.

Origin of the Blue Slip Process

Although not mentioned in the Judiciary Committee rules, blue slips are an informal practice unique to the committee, which has historically used blue slips on all U.S. attorney, U.S. marshal, U.S. district court and U.S. court of appeals nominations. Blue slips have been employed to block nominations in one of two ways, depending on the preferences of the Judiciary chairman. Judicial nominations have been blocked by a Senator either returning a negative blue slip or failing to return a blue slip altogether. Over the years, there have been various modifications to these basic practices.

In the case of U.S. district court nominations,[9] once a nomination is referred to the Judiciary Committee, the counsel for the committee will send a blue slip (so called because of its color) to each Senator of the nominee's home state, regardless of party affiliation. The Senator may then return the blue slip to the Judiciary Committee with comments on the particular nominee in question. In most cases, the blue slip is considered to be a pro forma gesture and will be given a positive review by the Senator; however, in a select number of cases a negative review may occur.

For U.S. circuit court nominations, the process is similar. The Judiciary Committee will give blue slips only to the Senators of the retiring judge's home state. This tradition comes from the practice of reserving circuit court positions for each state to ensure proportional or equal state representation for each circuit.[10] The President is often effectively required by this tradition to select a circuit court nominee from the state of the retiring judge.

If a negative blue slip is received, the chairman may take the following actions on the nominee: (1) stop all committee proceedings; (2) move forward but give added weight to the unfavorable review; or (3) proceed without notice of the negative review. Since the late 1970s, the committee has generally used the latter two actions when dealing with a negative blue slip.

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[9] Research has yielded no evidence of blue slip usage, in at least the last 50 years, for any nomination to a district court in U.S. territories or the District of Columbia or to the District of Columbia Court of Appeals. Neither the territories nor the District of Columbia have representation in the Senate. Hence, there was no blue slip given to home-state Senators in the cases of D.C. Circuit nominees Miguel A. Estrada and John G. Roberts, Jr., in the 108th Congress.

[10] For example, Sheldon Goldman wrote, "At the circuit court level, party leaders and senators expect that their state will be represented on the bench by a citizen of that state. Larger states feel entitled to more than one seat on their circuit. Smaller states in circuits in which there are not enough seats to go around expect that they will have a turn at representation." See Sheldon Goldman, *Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan* (New Haven: Yale University Press, 1997), p. 136.

The precise date on which the Judiciary Committee first used the blue-slip procedure is not known. The committee has not made the blue slip part of its official rules for more than 30 years,[11] and this is still the case in the 108th Congress.[12] From research conducted at the National Archives, evidence suggests that the blue-slip procedure began sometime in the mid- to late 1910s under the chairmanship of Senator Charles A. Culberson of Texas.[13]

This impression is based on the appearance of the first known blue slip in the 65th Congress (1917-1918). At the time, Senator Culberson was chairman of the Judiciary Committee, a capacity he served in from the 63rd through the 66th Congresses (1913-1919). The documentary evidence of this time period suggests that Senator Culberson may have created the blue slip. From the 65th Congress onward almost every judicial nominee's file includes a blue slip. Prior to this time (56th-64th Congresses), the files of judicial nominees reveal no evidence of blue slips.

Judiciary Committee materials at the National Archives do not provide a specific explanation for the creation of the blue slip; however, they may help illuminate its early history. For instance, although the White House and the Senate were controlled by the Democratic Party, there was periodic tension between the two branches, and this condition may have been a factor in the blue slip's creation.[14]

Of particular interest is the creation of blue slips at the same time as the adoption of Senate Rule XXII in 1917, which permits Senators to end a filibuster by invoking cloture.[15] Despite this apparent coincidence, a direct link between the creation of the blue slip and the cloture rule can be dispelled, because Senate Rule XXII did not apply to judicial nominations until 1949. In that year, S.Res. 15 modified Senate Rule XXII from, "to bring to a close the debate upon *any pending measure* is presented to the Senate ..." to the following: "to bring to a close the debate upon *any measure, motion, or other matter pending* before the Senate."[16]

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[11] In a 1979 memorandum, the Judiciary Committee staff stated, "at least for a decade there has been no 'rule of the Committee' on the subject." See memorandum to Senator Edward M. Kennedy, Jan. 22, 1979, cited in U.S. Congress, Senate Committee on the Judiciary, *The Selection and Confirmation of Federal Judges,* pp. 118-119.

[12] The blue slip procedure was not mentioned in the rules posted on the website for the Judiciary Committee, [http://judiciary.senate.gov/committee_rules.cfm], visited September 8, 2003.

[13] National Archives and Records Administration, Record Group 46, Records of the U.S. Senate, 65th Cong., Records of Executive Proceedings, Nomination Files, Judiciary Committee, George W. Jack. Blue Slip (1917).

[14] For example, in 1917, President Woodrow Wilson's Armed Ship Bill was defeated by a Senate filibuster. Two years later the Senate defeated ratification of the League of Nations Treaty.

[15] CRS Report RL30360, *Filibusters and Cloture in the Senate,* by (name redacted).

[16] Italics added. See U.S. Congress, Senate, Committee on Rules and Administration, *Senate Cloture Rule: Limitation of Debate in the Congress of the United States.* 99th Cong., 1st sess. Committee Print, S.Prt. 99-95 (Washington: GPO, 1985). Part 2, Legislative History of

(continued...)

Therefore, the Judiciary Committee did not need to create a blue-slip policy as a result of the 1917 Senate rule because cloture at that time did not apply to filibusters on judicial nominations.

Structure of the Blue Slip (1917-2003)

The basic structure of the blue slip has not changed substantially in the 86 years since its creation. For the first 27 years (1917-1944), the blue slip was actually handed to senators as a folded blue "slip" of paper. The blue slip form, printed on Judiciary Committee letterhead, would contain the date, the identity of the nomination, and the name of the Senator. At the top, the blue slip stated, "Sir: Will you kindly give me, for the use of the Committee, your opinion and information concerning the nomination of ..." It was signed by the committee chairman. At the bottom of the page, lines were left for the Senator to reply and provide comments concerning the nomination.

This structure did not change until the 67th Congress, when, in 1922, Chairman Knute Nelson (R) of Minnesota placed below the introductory text the following statement: "Under a rule of the Committee, unless a reply is received from you within a week from this date, it will be assumed that you have no objection to this nomination."[17] Before this time, the Judiciary Committee did not have a stated time limit for a senator to return a blue slip.

After that change, the next major modification to the blue-slip policy came during the chairmanship of Senator Strom Thurmond, when the Senator removed from the blue slip the clause, "Under a rule of the Committee," and left the remainder: "Unless a reply is received from you within a week from this date, it will be assumed that you have no objection to this nomination." Chairman Thurmond also added at the bottom of the blue slip, before the comments section, two boxes for checking, one titled, "I approve" and the other, "I oppose."

In 1998, Chairman Orrin G. Hatch replaced the traditional, "Unless a reply is received from you within a week from this date, it will be assumed that you have no objection to this nomination" with the following text: "Please return this form as soon as possible to the nominations office in Dirksen G-66. No further proceedings on this nominee will be scheduled until both slips have been returned by the nominee's home state senators."[18]

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[16](...continued)
Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate (Cloture Rule), pp. 105-109.

[17] National Archives and Records Administration, Record Group 46, Records of the U.S. Senate, 67th Cong., Records of Executive Proceedings, Nomination Files, Judiciary Committee, John Foster Symes, Blue Slip (1922).

[18] See Federal News Service, Senate Radio-TV Gallery, The Capitol, *News Conference with Senator Orrin Hatch, Senator Arlen Specter, Senator Jon Kyl and Senator Jeff Sessions*, May 3, 2001.

Shortly after the 2000 elections, when Senator Patrick Leahy held the chairmanship of the Judiciary Committee,[19] the blue slip again was modified. Instead of reinstating the Thurmond blue slip statement of, "Unless a reply is received from you within a week from this date, it will be assumed that you have no objection to this nomination," Chairman Leahy inserted the following statement, "Please return this form as soon as possible to the Committee office in Dirksen 147." The "No further proceedings ..." statement, instituted under Chairman Hatch, was dropped as well.

Chairman Leahy also modified the introduction by substituting, "Will you kindly give me, for the use of the Committee, your opinion and information concerning the nomination of," with the statement of "Please give me your opinion concerning the following nomination now pending before the Senate Judiciary Committee." Before Leahy's modification, the text of the initial introduction had never been changed.

The current blue slip form has retained Senator Leahy's phrasing and form except room number designation changes.

First Example of a Senator Using the Blue Slip

The first example found of a Senator using a blue slip to oppose a judicial nomination was in the spring of 1917 (65th Congress). President Woodrow Wilson had recently nominated U. V. Whipple to the Southern District of Georgia; Senator Thomas W. Hardwick returned a negative blue slip on April 9, 1917. In his blue slip reply, Senator Hardwick wrote, "I object to this appointment — the same is personally offensive and objectionable to me, and I can not consent to the confirmation of the nominee."[20] At that time, a blue slip did not necessarily prevent committee action on a nomination. As such, Whipple's nomination was reported, albeit adversely, to the Senate, where he was rejected without a recorded vote on April 23, 1917.[21]

The Blue-Slip Policy: 65th-108th Congresses

The record on the Judiciary Committee's formal written rule on blue slips is unclear. Even if complete records were kept on blue slips, a chairman's policy may have been different in practice than what was stated. Thus, determining the particular

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[19] At the beginning of the 107th Congress, before President-elect George W. Bush was sworn in as President and the Republican Party would regain control of the Senate with the tie-breaking vote of Vice-President Dick Cheney, the Senate was controlled by the Democratic Party.

[20] National Archives and Records Administration, Record Group 46, Records of the U.S. Senate, 65th Cong., Records of Executive Proceedings, Nomination Files, Judiciary Committee, U. V. Whipple, Blue Slip (1917).

[21] U.S. Congress, Senate, *Journal Of The Executive Proceedings Of The Senate*, vol. L1, part 1, 65th Cong., 1st sess. (Washington, GPO, 1959), p. 184.

policy at any given time can be difficult. Research of historical records and newspaper accounts reveals, however, the following Judiciary Committee policies on the blue slip for each of the last 48 Congresses (1917-2003). Each section will highlight the chairman's stated blue-slip policy and show, when necessary, instances where the policy differed, in practice from the stated blue-slip policy.

In addition, the table at the end of this report provides information on the Senate Judiciary Committee's blue slip policy for each of the last 21 Congresses, dating back to 1956. The table begins in 1956 because it was then that the Judiciary Committee began to permit Senators to use the blue slip as a way to block judicial nominations. The table is arranged chronologically by the date in which a change occurred in the blue-slip policy of the Senate Judiciary Committee. Working from left to right, column one consists of the name of the Judiciary Committee chairman. Columns two and three list the years and Congresses that a particular blue-slip policy was in use. Finally, column four describes the Judiciary Committee's blue-slip policy for those years and Congresses.

65th-84th Congresses

Chairman Culberson's written blue-slip policy was to merely ask the opinion of the home-state Senators on a particular judicial nomination. A specified rule limiting the amount of time to return a blue slip did not become part of the Judiciary Committee's stated policy until 1922 when Chairman Knute Nelson placed it on the blue-slip form in the 67th Congress. No reason was given for that modification, nor does the historical record point to any event that would have given cause for this change.

From the 65th through the 84th Congresses, no chair of the Judiciary Committee allowed any negative blue slips to automatically veto a nomination. For example, despite the blue-slipping of U. V. Whipple by Senator Hardwick of Georgia, the chairman still moved ahead with a hearing and even a committee vote. A blue slip apparently did not give a Senator an absolute right to block a judicial nomination and prevent committee action.

This norm can be seen in the statements made by individual Senators who asked if they could appear before the Judiciary Committee to express their objections to the particular nominee that they were blue-slipping. For example, in 1936 Senator Theodore G. Bilbo returned a negative blue slip on Edwin R. Holmes, who had been nominated to be U.S. Circuit Court judge for the fifth circuit. On his blue slip, Senator Bilbo stated, "I positively object to Holmes."[22] Although Senator Bilbo stated his objection to the nominee, he did not call for the committee to stop all proceedings on the nomination, but instead stated that he would "be pleased to make known my objection to [this] sub-committee when [a] hearing is ordered."[23]

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[22] National Archives and Records Administration, Record Group 46, Records of the U.S. Senate, 74th Cong., Records of Executive Proceedings, Nomination Files, Judiciary Committee, Edwin R. Holmes, Blue Slip (1936).

[23] Ibid.

Fourteen years later (1950), Senator Bourke B. Hickenlooper, after noting on his blue slip that he "vigorously object[ed]" to the nomination of Carroll O. Switzer to be U.S. District Court judge for the southern district of Iowa, wrote, "I shall be glad to appear before your committee on this matter."[24] Likewise in the same year, Senator Richard Russell asked the Judiciary Committee Chairman Patrick McCarran if he could "appear before the Committee and present some of the circumstances relating to this nomination before the Committee reports it to the Senate, as I am opposed to his confirmation."[25] In each case, the objecting Senator asked to appear before the Judiciary Committee to state his case against the individual being nominated.

What these examples appear to show is that the Judiciary Committee policy during this time was that a negative blue slip was not intended to prevent committee action. Instead, a Senator's negative assessment of a nominee was meant to express to the committee his views on the nominee so that the chairman would be better prepared to deal with the review of the nomination. The end result was that Judiciary Committee chairmen did not traditionally view a negative blue slip as a sign to stop all action on judicial nominations. This is important to note because of the modification to this policy norm during the 84th Congress.

84th-95th Congresses

From 1956 through 1978, Senator James O. Eastland chaired the Judiciary Committee and brought about the first fundamental change to the way the committee used blue slips. During his tenure, it appears that blue slips were handled as absolute vetoes by Senators.[26] The policy was that if a Senator either returned a negative blue slip or failed to return one at all, the committee would stop all action on a nominee.[27]

Evidence for this policy is suggested by the fact that no judicial nomination on which there was a negative blue slip was rejected by the committee and then subsequently reported to the Senate during this time period.[28] In previous

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[24] National Archives and Records Administration, Record Group 46, Records of the U.S. Senate, 81st Cong., Records of Executive Proceedings, Nomination Files, Judiciary Committee, Carroll O. Switzer, Blue Slip (1950).

[25] National Archives and Records Administration, Record Group 46, Records of the U.S. Senate, 81st Cong., Records of Executive Proceedings, Nomination Files, Judiciary Committee, M. Neil Andrews, Blue Slip (1950).

[26] See "The Judiciary: Nixon Nearing Record On Nominees," *Congressional Quarterly*, Dec. 16, 1972, p. 3161, and Richard Cohn, "Advice and Consent Advice," *National Journal*, vol. 10, April 15, 1978.

[27] See "The Judiciary: Nixon Nearing Record On Nominees," *CQ*, Dec. 16, 1972, p. 3161; Charles R. Babcock, "Picking Federal Judges: Merit System vs. Pork Bench," *Washington Post*, November 7, 1978, p. A4; and Sheldon Goldman, *Picking Federal Judges* (New Haven, CT: Yale University Press, 1997), p. 12.

[28] The Judiciary Committee did reject a judicial nomination late in Eastland's tenure. During the 95th Congress, the nomination of Robert F. Collins to be U.S. District Court (continued...)

Congresses, the Judiciary Committee would report most nominations with a negative blue slip to the Senate with adverse recommendations. With the decrease in observance of the "personally obnoxious" standard, however, a Senate rejection was no longer certain. Therefore, the committee changed its traditional blue-slip policy and proceeded to stop all action on a judicial nomination when a home-state Senator returned a negative blue slip or failed to return one.[29]

96th Congress

Senator Edward M. Kennedy chaired the Judiciary Committee during the 96th Congress. Although he led the committee for only one Congress (1979-1981), he ushered in a number of significant changes to the way judicial nominations were handled.[30] In relation to the committee's blue-slip policy, Chairman Kennedy informed his colleagues that when a Senator failed to return a blue slip, he would let the full committee vote on whether to proceed.[31] In a 1979 Judiciary Committee hearing, Chairman Kennedy stated that he had

> instructed the committee staff to send to both Senators from a nominee's State a blue slip requesting the Senator's opinion and information concerning the nominee. If the blue slip is not returned within a reasonable time, rather than letting the nomination die I will place before the committee a motion to determine whether it wishes to proceed to a hearing on the nomination

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[28](...continued)
judge for eastern Louisiana was first denied approval by the Judiciary Committee on a split vote of 5-5 on April 14, 1978; however, a subsequent motion to report favorably was approved by a 13-1 vote on May 16, 1978. This case is distinguishable from other committee rejections concerning blue slips on two grounds. First, the committee vote was not an outright rejection but instead a split vote resulting in a "de jure" rejection. Second, unlike previous cases during the 65th through the 84th Congresses, Collins did not represent a direct connection with the blue slip policy. In particular, the opposition to Collins came from Sen. Dennis DeConcini. Collins was in fact supported by his home-state senator. For example, during the committee's second vote on Collins, Sen. Russell B. Long came before the committee and asked the members to "measure up to the challenge and consider this man the way you would any other nominee." See "Senate Committee Clears 2 Blacks as Federal Judges," *Washington Post*, May 17, 1978, p. A6.

[29] Melinda Black, Elaine Shannon, and Diane Camper, "Judges: On the Merits?" *Newsweek*, Feb. 12, 1979, p. 94. See also "Senate Shelves Morrissey Judgeship Nomination," *Congressional Quarterly*, Oct. 22, 1965, p. 2149; W. Dale Nelson and Fred S. Hoffman, "Washington Washington," *The Associated Press*, Jan. 25, 1979; and Editorial, "Curbing the 'Blue-Slip' Veto," *Washington Post*, Jan. 31, 1979, p. A18.

[30] For a further discussion on Kennedy's modifications to the confirmation process, see Sheldon Goldman, *Picking Federal Judges*, p. 263.

[31] U.S. Congress, Senate Committee on the Judiciary, *Selection and Confirmation of Federal Judges: Hearings Before the Senate Committee on the Judiciary*, Part I, 96th Cong., 1st Sess., (Washington: GPO, 1979), p. 4. See also Sheldon Goldman, *Picking Federal Judges* (New Haven, Conn.: Yale University Press, 1997), p. 12; and Editorial, "Curbing the 'Blue-Slip Veto," *Washington Post*, Jan. 31, 1979, p. A18.

> notwithstanding the absence of the blue slip. The committee, and ultimately the Senate, can work its will.[32]

Besides Chairman Kennedy's modification to the stated blue-slip policy, there appeared to have been another change as well. A home-state Senator's objection to a nominee, in practice, did not have the same power to automatically stop committee action as before. This unstated change can be seen in the confirmation proceedings over a Virginia judgeship during the 96th Congress. Against the wishes of Virginia Senator Harry F. Byrd Jr., President Jimmy Carter nominated James E. Sheffield to the U.S. District Court for eastern Virginia. In committee, the nomination was opposed by Senator Byrd, who sent a negative blue slip to Chairman Kennedy. Senator Byrd reportedly did not object to holding a hearing for Sheffield.[33] On August 26, 1980, the Judiciary Committee held a hearing on Sheffield despite the blue slip objection. This marked the first reported instance since 1951 in which the Judiciary Committee moved forward on a blue-slipped nomination.[34] The committee took no further action and the Senate eventually returned the Sheffield nomination on December 16, 1980.

Chairman Kennedy established the first post-Eastland changes to the blue-slip system. The stated modification placed the decision to move forward on a nomination that had not received a home-state Senator's blue slip with the committee. The de facto alteration permitted the chairman to use his discretion to determine if the committee would act on a blue-slipped nominee. Chairman Kennedy said that his purpose in modifying the blue-slip policy was to allow "the Federal courts [to] ... become more representative of the people of this Nation."[35] He added, "we face the question of what to do about the longstanding practice of the one-member veto — or the blue-slip process.... I will not unilaterally table a

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[32] U.S. Congress, Senate Committee on the Judiciary, *Selection and Confirmation of Federal Judges: Hearings Before the Senate Committee on the Judiciary*, p. 4.

[33] Megan Rosenfeld, "A Soft-Spoken Judge at the Center of Controversy," *Washington Post*, July 20, 1980, p. F1.

[34] Sen. Paul Douglas, remarks in the Senate, *Congressional Record*, 82nd Cong., 1st sess., vol. 97, Oct. 9, 1951, p. 12839; U.S. Congress, Senate Committee on the Judiciary, *Joseph Jerome Drucker, of Illinois, to be United States District Judge for the Northern District of Illinois, To Fill a New Position*, report to accompany the nomination of Joseph Jerome Drucker, 82nd Cong., 1st sess., Executive Rept. No. 3 (Report found at National Archives and Records Administration, Record Group 46, Records of the U.S. Senate, 82nd Cong., Records of Executive Proceedings, Nomination Files, Judiciary Committee, Joseph Jerome Drucker, Executive Report (1951)); and, National Archives and Records Administration, Record Group 46, Records of the U.S. Senate, 82nd Cong., Records of Executive Proceedings, Nomination Files, Judiciary Committee, Joseph Jerome Drucker, Blue Slip (1951). Senator Paul Douglas objected to the nominations of Joseph J. Drucker and Cornelius J. Harrington as district judges. Despite that formal objection, the committee both held hearings and voted to report the nominations. Both nominations were reported adversely.

[35] U.S. Congress, Senate Committee on the Judiciary, Hearings: *Selection and Confirmation of Federal Judges*, p. 4.

nomination.... I cannot, however, discard cavalierly the tradition of senatorial courtesy, exception-riddled and outdated as it may be."[36]

97th-99th Congresses

Although it was reported that Senator Strom Thurmond was going to change the blue-slip policy in use under Senator Eastland,[37] at a January 19, 1981 Judiciary Committee organization meeting, Chairman Thurmond stated that he "would follow the same procedure ... [enacted] under Senator Kennedy." This meant that, "if [the committee] do[es] not hear of a Senator objecting, if he just does not send in his blue slip and if we do not hear within the seven days, we assume, as Senator Kennedy did, there is no objection." Chairman Thurmond did make a point of stating "that if either Senator objects to a nomination we should not go forward with it."[38]

Therefore, under Chairman Thurmond's blue-slip policy, a home-state Senator could stop all committee action on a judicial nominee by returning a negative blue slip; however, the committee would not stop action on a nominee if the home-state Senator failed to return it. As such, Chairman Thurmond was following Senator Kennedy's modification to the blue-slip policy but also stating that a single home-state Senator still had the power to stop committee action on a nominee. Like that of his predecessor, however, Chairman Thurmond's blue-slip policy was not always consistent, as shown by President Reagan's District Court nominations in 1983 and 1985.

In 1983, reportedly at the suggestion of retiring Senator Samuel Hayakawa of California, President Reagan selected John P. Vukasin Jr., to be U.S. District judge for northern California.[39] However, Vukasin was opposed by Senator Alan Cranston of California, who returned a negative blue slip to the committee.[40] Despite Senator Cranston's objection, Chairman Thurmond went ahead with Vukasin's nomination, and on July 21, 1983 the nomination was reported favorably on a party line vote. This vote marked the first time since 1951 that the Judiciary Committee voted to

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[36] Ibid., p. 5.

[37] "Smith changes method for judicial selection," *The National Journal*, vol. 13, March 14, 1981, p. 459; David Pike, "The Court-Packing Plans: Politicians Gain More Savvy in Selecting U.S. Judges," *The National Law Journal*, Aug. 29, 1983, p. 1; and David Pike, "The Appointment Process Under Carter and Reagan," *The National Law Journal*, Aug. 29, 1983, p. 26.

[38] U.S. Congress, Senate Committee on the Judiciary, Business Meeting, unpublished committee transcript, 97th Cong., 1st sess., 1981, pp. 6-7. The hearing can be found at the Senate Judiciary Committee's library.

[39] Rich Arthurs, "Judicial Nominations Doggedly Backed by Administration," *The Legal Times*, Dec. 26, 1983, p.1.

[40] David F. Pike, "The Court-Packing Plans: Politicians Gain More Savvy in Selecting U.S. Judges," *The National Law Journal*, Aug. 29, 1983, p. 1.

report out a nomination despite the blue slip objection of a home-state Senator.[41] Once through committee, the Senate eventually confirmed Vukasin by voice vote.[42]

Two years later, in 1985, President Reagan selected Albert I. Moon Jr. to be a U.S. District judge for Hawaii. In this case, both Hawaii Senators, Daniel Inouye and Spark Matsunaga, opposed the nomination and sent back negative blue slips to the committee.[43] Although tradition dictated that negative blue slips from both home-state Senators would prevent committee action, Chairman Thurmond decided to move forward. On November 22, 1985, the committee held a hearing on the Moon nomination. This marked the first reported instance in which the Judiciary Committee acted on a nomination despite the presence of two negative blue slips. After the hearing, the committee took no further action and the Senate eventually returned the Moon nomination on December 20, 1985.

Like Senator Kennedy in the 96th Congress, Chairman Thurmond did not allow the failure of a home-state Senator to return a blue slip to stop committee action. Furthermore, the presence of one or even two negative blue slips was no longer enough to prevent committee action. The end result was that Chairman Thurmond substantially changed how the blue-slip policy operated. Yet it should be noted that the Moon nomination was the only known example during this time period of a chairman moving forward on a nomination despite the presence of two negative blue slips. This is important because, since the blue slip is not a committee rule, the chairman has the discretion to change the policy when deemed necessary. Therefore, as the Vukasin and Moon cases show, the stated and practiced blue-slip policies can at times be confusing if not contradictory to one another.

100th-103rd Congresses

Under the chairmanship of Joseph R. Biden, Jr., the Judiciary Committee continued to follow the blue-slip modifications put in place by Senators Kennedy and Thurmond. However, Chairman Biden also made changes to the blue-slip policy. During the 101st Congress, Chairman Biden issued a public statement of the committee's blue-slip policy. Shortly after the inauguration of George H. W. Bush in 1989, Chairman Biden sent a letter to the President stating the committee's blue-slip policy:

> The return of a negative blue slip will be a significant factor to be weighed by the committee in its evaluation of a judicial nominee, but it will not preclude

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[41] See footnote 34.

[42] For a more detailed discussion of Vukasin's nomination see Rich Arthurs, "Judicial Nominees Doggedly Backed By Administration," *Legal Times*, Dec. 26, 1983, p. 1; and David Pike, "The Court-Packing Plans: Politicians Gain More Savvy in Selecting U.S. Judges," *The National Law Journal*, Aug. 29, 1983, p. 1.

[43] Memorandum from Senator Strom Thurmond to Senator Arlen Specter, *Blue Slip Policy*, June 8, 2001, p. 2. (Author's files); and "No action on Moon nomination," *United Press International*, Dec. 12, 1985, p. Washington News.

> consideration of that nominee unless the Administration has not consulted with both home state Senators prior to submitting the nomination to the Senate.[44]

Chairman Biden's letter represented the first formal, written statement by a Judiciary Committee chairman regarding the blue-slip procedure. In that letter, Chairman Biden expressed, in what had only been practiced and not stated by a chairman before, that the committee would no longer treat a negative blue slip as an absolute means of stopping committee action. Presidential consultation with both home-state Senators might be enough to move the nomination through committee even with the presence of a negative blue slip. This was a important event in terms of outlining a clear picture of the standards to be used in the blue-slip process. In particular, Chairman Biden's letter underscored that prior consultation would be a primary factor in evaluating a negative blue slip.

The 1989 nomination of Vaughn R. Walker to be a U.S. District judge for northern California marked the first time that Senator Biden's policy was put to the test. Walker was originally recommended to the President by Senator Pete Wilson of California. California's senior Senator Alan Cranston opposed the nominee. In committee, Senator Cranston returned a negative blue slip to Chairman Biden, who stated that Cranston's opposition would "affect Walker negatively."[45] However, Chairman Biden's statement evidently meant that only a delay in the committee's proceedings would occur and not an outright blocking of the nomination. After a committee investigation, Chairman Biden moved ahead with the nomination and eventually Walker was reported out of the committee by a 11 to 2 vote.[46] Soon afterward, Walker was confirmed by voice vote on November 22, 1989.

Chairman Biden made public the standards that the Judiciary Committee would use in considering negative blue slips. The committee had previously worked under the policy that a negative blue slip would not necessarily prevent committee action, however, the previous two chairmen had never publicly stated that modification to the blue-slip policy. Moreover, Presidents tended to consult with home-state Senators before this time but by making the requirements public Chairman Biden placed the pre-nomination selection process in the forefront of the confirmation process. Therefore, the letter, in stating this expectation, helped to address the question of the blue slip's place in the appointment process.

104th Congress to June 5, 2001, of the 107th Congress

After the Republican Party gained control of the Senate in the 1994 elections, Judiciary Chairman Orrin G. Hatch continued Senator Biden's practice of stating publicly the panel's blue-slip policy. At the start of his chairmanship, Hatch sent a

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[44] Sen. Joseph R. Biden, Jr., Chairman, Committee on the Judiciary, U.S. Senate, letter to President George H. W. Bush, The White House, June 6, 1989 (author's files).

[45] Mike Robinson, "Senate Panel Pushing Ahead With Judge Candidate Despite Cranston," *The Associated Press,* May 18, 1989. See also memorandum from Senator Strom Thurmond to Senator Arlen Spector, "Blue Slip Policy," June 8, 2001, p. 2 (author's files).

[46] Ruth Marcus, "Stalled Judicial Nomination Advances; Panel Approves Walker Despite Uproar Over Past Ties to Men-Only Club," *Washington Post,* Nov. 17, 1989, p. A21.

letter to President William J. Clinton's counsel, Abner J. Mikva, stating how the blue-slip system would be observed. In the letter, Chairman Hatch said that he would follow the "policy as articulated and practiced by Senator Biden in 1989,"[47] which was to "not preclude consideration" of a nominee "unless the Administration has not consulted with both home state Senators."

Two years later, in a 1997 press release, Chairman Hatch articulated a more detailed account of his blue-slip policy. This message was a response to his colleagues' frustrations over not receiving "the level of consultation that they have expected." Chairman Hatch began by quoting Majority Leader George Mitchell (D) on the requirements of executive and legislative consultations on nominations:

> [O]ne way to avoid such confrontations [between the Senate and the White House] in the future is for the President to engage in meaningful consultation with the Senate before making significant nominations .... Countless historical examples justify consultations; the public supports it; and common sense counsels it ... In an era of divided government, the choice the two branches face with respect to nominations is the choice we face with respect to all other matters: cooperation or confrontation .... We are confident that meaningful consultation can occur without reducing the role prerogatives of either branch of government, and in a way which more fully informs the President of other points of view prior to rather than after a nomination is made.[48]

Chairman Hatch went on to state that he had "sent a letter to the White House counsel ... which clearly explains this policy."[49] In that letter, he laid out five circumstances that would prompt the Judiciary Committee to delay or hold up a nomination:

> (1) failure to give serious consideration to individuals proposed by home state Senators as possible nominees;
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> (2) failure to identify to home state Senators and the Judiciary Committee an individual the President is considering nominating with enough time to allow the Senator to provide meaningful feedback before any formal clearance (i.e., by the ABA or FBI) on the prospective nominee is initiated;
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> (3) after having identified the name of an individual the President is considering nominating, failure to (a) seek a home state Senator's feedback, including any objections the Senator may have to the prospective nominee, at least two weeks before any formal clearances are initiated, and (b) give that feedback serious consideration;

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[47] Sen. Orrin G. Hatch, Chairman, Committee on the Judiciary, U.S. Senate, letter to Counsel to the President, Abner J. Mikva, The White House, February 3, 1995, (Author's files). See also Greg Gordon, "A Warning Sign for Left of Center Judicial Candidates," Minneapolis *Star Tribune*. January 21, 1995, p. 7A.

[48] Statement by Senator George Mitchell, *Congressional Record*, vol 138 (1992), p. 892. Cited in Judiciary Committee News Release, Sen. Orrin Hatch, Chairman, April 17, 1997.

[49] Judiciary Committee News Release, Sen. Orrin Hatch, Chairman, April 17, 1997. (Author's files).

> (4) failure to notify a home state Senator, and the Judiciary Committee, that formal clearance on a prospective nominee is being initiated despite the Senator's objections; and
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> (5) failure to notify home state Senators, and the Judiciary Committee, before a nomination is actually made, that the President will nominate an individual.[50]

A little over three months after the start of President George W. Bush's administration, several reports surfaced that Chairman Hatch was planning to modify his blue-slip policy.[51] News reports were based on two Judiciary Committee meetings. The first, held on April 5, 2001, was a confirmation hearing on the nominations of Larry D. Thompson to be Deputy Attorney General and Theodore B. Olson to be Solicitor General of the United States. After the question and answer period, in response to a question concerning the selection process by Senator Charles E. Schumer, Chairman Hatch stated what his blue-slip policy would be under President Bush.[52]

Chairman Hatch began by stating that he would institute the same policy that "I had asked the Clinton Administration to follow,"[53] which was based on the 1989 Biden letter to President Bush and his own 1995 letter to White House Counsel Abner Mikva. Chairman Hatch went on to describe and quote these letters in detail:

> Senator Biden's letter explained the return of a negative blue slip ordinarily does not preclude consideration of a judicial nominee, but is given substantial weight by the Committee in its evaluation of the nominee. Senator Biden also emphasized the importance of pre-nomination consultation by the administration, with home state Senators, stressing his belief, that, quote, "The nomination process will function more effectively if consultation is taken seriously," unquote. Thus, as Senator Biden also wrote, quote, "If such good-faith consultation has not taken place, the Judiciary Committee will treat the return of

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[50] Sen. Orrin G. Hatch, Chairman, Committee on the Judiciary, letter to Counsel to the President, Charles C. F. Ruff, The White House, April 16, 1997. (Author's files).

[51] According to a news report, "Republicans circulated a proposal to require just one senator from a state to sign off on a nomination." Cited in Elizabeth A. Palmer, "Hatch Seeking To Alter Senators' Veto Over Judges," *CQ Daily Monitor*, April 9, 2001, p. 5. For additional accounts of the reported changes to the blue slip policy, see also Amy Fagan and Elizabeth A. Palmer, "No Agreement Reached On Judicial Nomination Process," *CQ Daily Monitor*, April 25, 2001, p. 10; and Albert Eisele, "Senate Dems threaten to block judges," *The Hill*, April 25, 2001, p. 1 & 18.

[52] In his statement, Chairman Hatch asserted, "Let me just make one thing clear. Senator Schumer raised an important issue with Mr. Thompson regarding the role of the Senate and advise and consent duties with respect to judicial nominations." See U.S. Congress, Senate Committee on the Judiciary, Hearings: *Confirmation Hearing on the Nominations of Larry D. Thompson to be Deputy Attorney General and Theodore B. Olson to be Solicitor General of the United States*, 107th Cong., 1st Sess., (Washington: GPO, 2001), p. 138.

[53] Ibid., p. 138.

> a negative blue slip by a home state Senator as dispositive and the nominee will not be considered," unquote.[54]

Chairman Hatch stressed the pre-nomination consultation component of the blue slips and went on to note, "the Senate expects genuine good faith consultation by the administration with home state Senators before a judicial nomination is made, and the administration's failure to consult in genuine good faith with both home state Senators itself is grounds for a Senator's return of a negative blue slip." Thus, "[w]here the administration has failed to provide good faith pre-nomination consultation, a negative blue slip is treated as dispositive and precludes Committee consideration of a judicial nominee."[55] Chairman Hatch warned that "if any of our colleagues here want to veto the President's constitutional prerogative to make his appointments with the advice and consent of the Senate, that is a different matter, and one which I think diverges from the policy of this Committee since as far back as I can remember, and that is 25 years, since Senator Kennedy was Chairman of this committee."[56]

Senator Richard J. Durbin questioned the policy laid out by Chairman Hatch. Senator Durbin began by stating that "[t]he practice that has been followed in the 4 years that I have been in the Senate is different than what you have just described. In that time, one Senator could stop a nominee from a state." Moreover, he added, that "there have also been times when members of the Senate Judiciary Committee, not even from the same state as the nominee, could stop a nomination."[57]

Chairman Hatch responded to Senator Durbin's concerns. The discussion did not, however, settle the questions over the committee's blue-slip policy. The exchange ended with the understanding that the blue-slip policy would be discussed by the entire Judiciary Committee later that month.

The subsequent meeting, held in executive session on April 24, 2001, reportedly focused on the concerns Senator Durbin and other Democratic Senators had relating to the Judiciary Committee's blue-slip policy. However, neither side was able to come to an agreement on what the committee's blue-slip policy had been or what blue-slip policy would be followed in the 107th Congress. Reportedly, during this meeting, Chairman Hatch asserted that "his policy has always been that a negative blue slip from a single senator should be given great weight, but should not automatically block a nomination."[58]

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[54] Ibid., p. 138.

[55] Ibid., p. 139.

[56] Ibid., p. 139.

[57] Ibid., p. 139.

[58] Heather M. Rothman, "Committee Members Still Deadlocked On 'Blue Slip' Issue," *CQ Daily Monitor*, April 27, 2001, p. 10.

Democratic Senators were reportedly alarmed, stating that it was "an unfair change in [the blue slip] policy."[59] Part of the problem in reaching a compromise was that Democratic Senators claimed that Chairman Hatch had allowed individual Senators to use a blue slip to prevent nominees from being confirmed during the Clinton Administration. For example, the *CQ Daily Monitor* reported that "Jesse Helms, R-N.C., used the 'blue slip' to block Clinton's nominees to the bench in his state even when they had the approval of Democrat John Edwards."[60]

Chairman Hatch scheduled another committee meeting on May 3, 2001. However, news reports stated that the Democratic members of the Judiciary Committee "walked out of" the meeting because "they [were] being shut out of the judicial nominations process."[61] Both parties held news conferences shortly after to state their position on the matter of blue slips.

At the Democratic news conference, Senator Leahy said that Chairman Hatch had changed the blue-slip policy in place during the Clinton Administration.[62] Senator Leahy read an old version of Chairman Hatch's blue slip: "No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home-state senators."[63] Senator Leahy went on to assert, "this was the Republican policy when there was a Democratic president. It should be the same policy with a Republican president."[64]

Chairman Hatch, at the Republican news conference held the same day, answered the Democratic Senators' assertions by stating, "As I confirmed in two letters to the White House in 1995 and 1997, during my tenure as chairman, I continued as a matter of practice and policy to follow the committee's blue slip policy of my predecessor, Joe Biden."[65] That policy, Chairman Hatch stated, was a continuation of Senator Kennedy's blue-slip policy, which was "[a] withholding of a blue slip or a denial of a blue slip or a negative blue slip will have great weight, but it will not be dispositive."[66] Chairman Hatch continued by stating that the change in blue-slip policy occurred in 1998:

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[59] Elizabeth A. Palmer, "For Bush's Judicial Nominees, A Tough Tribunal Awaits," *CQ Weekly*, April 28, 2001, p. 898.

[60] Amy Fagan and Elizabeth Palmer, "No Agreement Reached On Judicial Nomination Process," *CQ Daily Monitor*, April 25, 2001, p. 10.

[61] Amy Fagan, "Gridlock Threatens Nominees," *CQ Daily Monitor*, May 7, 2001, p. 10.

[62] Federal News Service, Senate Radio-TV Gallery, The Capitol, *News Conference with Senator Patrick Leahy, Senator Charles Schumer and Senator Russell Feingold*. May 3, 2001.

[63] Ibid.

[64] Ibid.

[65] Federal News Service, Senate Radio-TV Gallery, The Capitol, *News Conference with Senator Orrin Hatch, Senator Arlen Specter, Senator Jon Kyl and Senator Jeff Sessions*, May 3, 2001.

[66] Ibid.

> [W]hen we had a conflict between two Republican senators, and I sent a message to them through the blue slip policy and changed it to the point — and, by the way, in 1998 we were getting zero — zero — consultations with the Clinton White House. I sent them a letter saying this is serious problem, and I made it very clear that we couldn't put up with it. And because of the conflict with the two Republican senators, we changed the policy to the consent of — to require the blue slips from both, but mainly because of the lack of consultation.... "[67]

Chairman Hatch defended the 1998 change in the blue-slip policy by stating, "I agreed to follow the policy of Biden up till that point [1998], and I still followed it after that point, except for those where there was no consultation, and even then would not allow just one senator to stop a nominee."[68]

Finally, Chairman Hatch answered the criticisms by Democratic Senators that there were instances, during the Clinton Administration, in which an individual Senator could block a nomination. He asserted, "[t]here again I followed the Biden policy. If I did honor a negative blue slip as dispositive in and of itself, it was because the White House had clearly failed to engage in any meaningful consultation with home state senators."[69] As the statements by Chairman Hatch and Senator Leahy illustrate, there was an ongoing factual dispute over the blue-slip policy followed by the committee during the Clinton presidency. Both sides made arguments supporting their cause; however, this was the last substantive debate on the blue-slip policy before Senator James Jeffords of Vermont left the Republican Party to become an Independent, which led to the change in party control of the Senate. It should be noted that the May 3, 2001 meeting and the news conferences occurred after it was known that the party balance would shift and that Senator Leahy would become chairman.

June 6, 2001, to the End of the 107th Congress

On June 6, 2001, Senator Leahy took over as Judiciary chairman. Shortly before the Jeffords party switch, Senator Leahy and the other Democratic members of the Judiciary Committee stated in an April 27, 2001 letter to White House Counsel Alberto Gonzales how the Senate should be consulted by the President in terms of pre-nomination review. This letter, sent to Gonzales over a month before Senator Leahy became chair of the committee, endorsed the 1997 blue-slip policy statement "made by Chairman Hatch." As the letter notes, "the Administration [should] undertake to incorporate the following consultative procedures into its selection, vetting and nominating processes":

1. The Administration shall give serious consideration to individuals proposed by home state Senators as possible nominees.

2. The Administration shall consult with home state Senators and the Judiciary Committee (both majority and minority) regarding individuals the

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[67] Ibid.

[68] Ibid.

[69] Ibid.

President is considering nominating with enough time to allow Senators to consider the potential nominee and provide a meaningful response to the Administration before any formal clearance (i.e. by the FBI) on the prospective nominee is initiated.

3. Should the Administration choose to begin a formal clearance process of a nominee despite a home state Senator's objection, the Administration shall notify the home state Senators and the Judiciary Committee that this is the case before the clearance process starts.

4. When the President has made the final decision to nominate an individual, home state Senators and the Judiciary Committee shall be given at least one week's notice before the formal nomination is made.

5. When a nominee is sent to the Senate, supporting documentation for the nomination shall be simultaneously sent to the Senate in order to expedite the Senate's evaluation of the nominee.

6. The nominee shall be directed by the Administration to cooperate fully with Senators who seek information regarding that nomination.[70]

Although Senator Leahy's statement was a further refinement of Senator Hatch's policy regarding blue slips in terms of consultation, it was reported that Senator Leahy would follow a different policy than Senator Hatch's. For example, the *CQ Daily Monitor* reported that Chairman Leahy indicated he "probably will return to the practice of moving ahead with a nomination only with approving 'blue slips' from both senators representing the nominee's home state."[71] This report was supported later on June 6, 2001, when *CQ Weekly* reported that, in an interview, Chairman Leahy identified his blue-slip policy: "unless he is satisfied that both senators from the home state of a nominee have been consulted by the Bush administration, a nomination will not move."[72]

News reports claim that Chairman Leahy not only adhered to the policy stated on June 6, 2001, but went further.[73] These reports indicated that Chairman Leahy permitted Michigan Democratic Senators Carl Levin and Debbie Stabenow to not only block nominations of fellow Michiganders to the Sixth Circuit Court of Appeals, but all nominations to that Circuit.[74] *The Legal Times* cited an August 6,

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[70] Democratic Senators, Committee on the Judiciary, U.S. Senate, letter to Counsel to the President Alberto R. Gonzales, The White House, April 27, 2001. (Author's files).

[71] Elizabeth A. Palmer and Amy Fagan, "Power Shift at Judiciary Could Be Problem for Bush," *CQ Daily Monitor*, May 24, 2001, p. 3.

[72] Elizabeth A. Palmer, "Senate GOP Backs Down From Dispute Over Handing of Nominees," *CQ Weekly*, June 9, 2001, p. 1360.

[73] For example, *The Legal Times* reported that Senators Barbara Boxer and John Edwards held up two judicial nominations during the 107th Congress. See, Jonathan Groner, "A Major Shift in the Battle for the Bench," *The Legal Times*, Nov. 11, 2002, p. 8.

[74] Traditionally Senators can only blue slip circuit court nominees which the President has (continued...)

2001 letter written to Chairman Leahy by Senators Levin and Stabenow asking the chairman to "halt all movement on any nominations to the 6th Circuit."[75] Reportedly, Senators Levin and Stabenow "used their blue slips to block confirmation" of two Sixth Circuit nominations, Jeffrey Sutton of Ohio and Deborah Cook of Ohio, during the 107th Congress.[76]

Also during the 107th Congress, Chairman Leahy, along with Ranking Member Hatch, agreed to a fundamental change to the blue-slip system. Under their agreement the blue slips would "be treated as public information."[77] The two Senators stated: "[w]e both believe that such openness in the confirmation process will benefit the Judiciary Committee and the Senate as a whole." In order to confirm continuance of this new reform, both Senators also agreed that "this policy of openness with regard to 'blue slips' and the blue slip process will continue in the future, regardless of who is Chairman or which party is in the majority in the Senate."[78] This agreement was adhered to, and continues, with blue slips publicly available on the Office of Legal Policy website.[79]

108th Congress

With Senator Hatch once again chairing the Judiciary Committee, it was reported that he would reinstate his previous blue-slip policy where "a single negative blue slip from a nominee's home state won't be enough to block a confirmation hearing."[80] Chairman Hatch told reporters, "I'll give great weight to negative blue slips, but you can't have one senator holding up, for instance, circuit nominees."[81] Thus, the blue-slip policy in the 108th Congress is that only one of the home-state Senators must return a positive blue slip before the Judiciary Committee will move forward with a nomination — provided that the Administration engages in pre-nomination consultation with both home-state Senators.

The stated policy was followed when, on April 1, 2003, Chairman Hatch granted a hearing for Carolyn Kuhl of California to be U.S. Circuit Court judge for the Ninth

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[74](...continued)
selected from their home-state. Thus, any attempt to prevent every nomination from the same circuit from being confirmed is unusual.

[75] "Inadmissible," *The Legal Times*, Aug. 20, 2001, p. 3; and Jonathan Ringel, "Showtime at Senate Judiciary," *The Legal Times*, Sept. 3, 2001, p. 1.

[76] Neil A. Lewis, "The Nation: Here Come the Judges; First the Senate, Now the Courts of Appeals," *The New York Times*, Dec. 1, 2002, p. 3.

[77] Letter from Senators Patrick Leahy and Orrin Hatch, *Congressional Record*, vol. 147, June 29, 2001, p. S7285.

[78] Ibid.

[79] Available at [http://www.usdoj.gov/olp/blueslips1.htm], visited October 21, 2003.

[80] Tony Mauro, "Estrada, Sutton on the Senate Fight Card," *The Legal Times*, January 27, 2003, p. 3.

[81] Associated Press, "GOP Move Would Help Nominees," *Washington Post*, January 24, 2003, p. A25.

Circuit.[82] The hearing marked the first time in the 108th Congress that the Judiciary Committee moved forward with a nomination without the support of both home-state Senators:[83] Senator Dianne Feinstein of California had returned a blue slip to the committee.[84] The Kuhl nomination appears to represent a significant change in the blue slip policies between Chairman Leahy in the 107th Congress and Chairman Hatch in the 108th Congress. During the 107th Congress, Chairman Leahy required both blue slips to be returned, which meant that no action was taken on Kuhl's nomination. Without the return of California Senator Barbara Boxer's (D) blue slip, Senator Leahy had declined to advance the Kuhl nomination in the 107th Congress. However, in the 108th Congress, even without Senator Boxer returning her blue slip, Chairman Hatch held a hearing.

Also in the 108th Congress, shortly before the 2003 August recess, Chairman Hatch held a hearing for Henry Saad of Michigan to be U.S. Circuit Court judge for the Sixth Circuit. Chairman Hatch moved forward with the Saad nomination despite the objection of Michigan Senators Carl Levin and Debbie Stabenow. This marked the first reported instance that a nomination with two negative blue slips has had any committee action since 1985 and only the second known case in committee history. Senators Levin and Stabenow had returned negative blue slips on March 19, 2003.[85]

Frequently Asked Questions

As this report indicates, there are varying nuances to the Judiciary Committee's blue-slip policy. During the tenure of different chairmen, a negative blue slip may or may not have permitted a home-state senator from stopping all committee action on a nomination. Even the failure to return a blue slip has called into question the ability of a chairman to move forward on a nomination. There is also the question of consultation and the degree to which a President must consult with both home-state Senators in the selection of a nomination. Finally, even if one understands the blue-slip policy and the requirements it places on a President, a particular chairman's own policy may be different in practice than what is stated. The following questions attempt to address some of these problems and concerns.

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[82] This was a re-submission of Carolyn Kuhl. In the 107th Congress, she was nominated twice (June 22 and Sept. 4, 2001) by President George W. Bush.

[83] Jennifer A. Dlouhy, "Appeals Court Nominee Kuhl Apologizes for Stance on Bob Jones University." *CQ Today*, April 2, 2003, p. 3.

[84] Senator Feinstein returned her blue slip on Mar. 11, 2003 with a "reserved judgement" note on it, which meant that the Senator had not yet made a determination on the nomination. Although the blue slip was not a positive endorsement of the candidate, functionally it permitted the chairman to move forward with the nomination because the blue slip was returned without a negative statement. See Office of Legal Policy website at [http://www.usdoj.gov/olp/blueslips1.htm].

[85] See [http://www.usdoj.gov/olp/blueslips1.htm], visited October 21, 2003.

What Is a Blue Slip?

A blue slip is a Senate Judiciary Committee custom, in which the chairman seeks either approval or disapproval from both home-state Senators. In practice, the chairman will send a blue colored form, which is called a blue slip, to the Senators of the state where the President has nominated either a U.S. Circuit or District Court nominee. Depending on the chairman's policy at the time, a return of one or two negative blue slips by the home-state Senators could stop further action on the nominee and thus prevent confirmation.

What Are the Justifications for a Blue-Slip Policy?

The practice of using a blue slip can be seen as a way for Senators to have a role in the selection of an individual who may have some impact on his/her state. Thus, when a President submits to the Senate individuals who will either fill a federal position in a Senator's state or will represent the state in some capacity, the chairman will give a blue slip to home-state Senators so that they may express an opinion on the nomination.

How Many Committees Have a Blue-Slip Policy?

The Senate Committee on the Judiciary is the only committee in either the Senate or the House of Representatives that currently employs the blue slip. Yet many committees that have a review function on executive nominations continue to practice, to varying degrees, the custom of senatorial courtesy that the blue slip represents.

Who Sets the Blue-Slip Policy?

The blue-slip policy is set by the chairman of the Judiciary Committee at the outset of every Congress. In recent years, the chairman has sent a letter to the President stating committee policy on blue slips and expectations the committee has of the President with regard to pre-nomination consultation with home-state Senators. Each chairman also has the ability to make changes to the blue slip policy whenever he or she deems it appropriate.

Why Does the Blue-Slip Policy Change?

Each chairman has the prerogative to set blue-slip policy. It generally changes when there is a change in the party majority.

What Is the Blue-Slip Policy in the 108th Congress?

The blue-slip policy in the current Congress is that a negative blue slip is given due consideration by the chairman but will not prevent future action by the committee unless the President has not consulted with both home-state Senators.

What Are the Key Benchmark Dates for Blue Slips?

The following are some of the more important dates of note for blue slips:

- 1917 — first appearance of a blue slip
- 1917 — first appearance of a negative blue slip
- 1922 — time limit placed on the return of blue slips
- 1956 — first formal change in blue-slip policy since its creation
- 1979 — second alteration in blue-slip policy
- 1989 — first public statement of the blue-slip policy
- 1998 — time limit removed on the return of blue slips
- 2001 — first time blue slips made public

When Does a Blue Slip Postpone a Nomination Indefinitely?

Depending on the chairman's policy during a given Congress, the postponement of a nominee would either take a return of a negative blue slip or the failure of a Senator to return a blue slip. See table on the blue-slip policy of the last six chairmen.

Are Blue Slips Public Information?

Yes. As part of the June 2001 reorganization agreement, blue slips were made public for the first time starting in the 107th Congress. The status of every blue slip for the 108th Congress can be found on the Office of Legal Policy website page.[86]

Conclusion

The blue slip represents an aspect of senatorial courtesy. Blue-slip policy has undergone various changes in its 86-year history. The blue slip started out as a way for the Judiciary Committee chairman to gain information on a judicial nomination. From 1917 to 1956, the blue slip provided home-state Senators with a means of notifying the chairman if the President selected an individual who was personally objectionable to them. A negative blue slip did not stop committee action. Until the mid-1950s, other Senators would reject a nomination on the Senate floor if the home-state Senator would stand and state that the nominee was "personally obnoxious." Eventually, the blue slip evolved from an informal committee device once used to gain information on a nominee to an important device for checking the executive branch in the appointment process.

Since 1979, the impact of negative blue slips has varied as leadership in the Senate Committee on the Judiciary has changed. Some chairmen have permitted committee action on a nomination only when both home-state Senators return positive blue slips. However, other chairmen have proceeded to consider a nomination with receipt of only one positive blue slip. Even though recent chairmen

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[86] See [http://www.usdoj.gov/olp/blueslips1.htm].

have implemented different blue-slip policies, each has communicated to the President the importance of pre-nomination consultation with both home-state Senators. Pre-nomination consultation has been a key expectation of recent chairmen in the evaluation of negative blue slips. The President is now expected to consult and involve each home-state Senator in the pre-nomination phase of the selection process. Without consultation by the White House, chairmen appear to accord greater value to a negative blue slip submitted by a non-consulted home-state Senator.

While the Judiciary chairman controls the impact of a negative blue slip, individual Senators can still determine the fate of a judicial nomination after it is reported to the Senate floor. A Senator, or a group of Senators, may choose to either place a hold on or filibuster a nomination. In each instance, at least theoretically, a vote can be delayed indefinitely — thus preventing confirmation of the President's nominee. A negative blue slip, therefore, is not the only means available to prevent the confirmation of a judicial nomination by a home-state Senator.

This report will be updated to reflect policy changes relating to blue slips.

Senate Judiciary Committee Blue-Slip Policy by Committee Chairman (1956-2003)

Chairman	Years	Congresses	Committee's Policy on Blue Slips
James O. Eastland, D-MI	1956-1978	84th Congress to 95th Congress	There would be no further proceedings on a nomination if one home-state Senator disapproved of the nominee by either returning a negative blue slip or failing to return a blue slip.[a]
Edward M. Kennedy, D-MA	1979-1981	96th Congress	The failure of a home-state Senator in returning a blue slip would not necessarily prevent committee action on a nomination without a formal committee vote.[b] (In practice, it appears that Chairman Kennedy also changed the blue-slip policy by not stopping committee action if a home-state Senator returned a negative blue slip).
Strom Thurmond, R-SC	1981-1987	97th Congress to 99th Congress	The failure of a home-state Senator in returning a blue slip would not necessarily prevent committee action on a nomination, but the committee would stop action on a nominee if a home-state Senator returned a negative blue slip.[c] (In practice, it appears that Chairman Thurmond did not necessarily stop committee action on a nominee when a home-state Senator returned a negative blue slip).
Joseph R. Biden Jr., D-DE	1987-1995	100th Congress to 103rd Congress	Continued to proceed with committee action even when a home-state Senator had not returned a blue slip. Also, the chairman asserted that a home-state Senator's negative blue slip would be upheld "only if the administration neglects to consult with lawmakers before making the nomination."[d]
Orrin G. Hatch, R-UT	1995-2001	104th Congress to 107th Congress	A negative blue slip would "not preclude consideration" of a nominee "unless the Administration has not consulted with both home state Senators."[e] A similar policy was articulated that gave five circumstances that would trigger a committee delay or inaction in the consideration of a judicial nomination.[f]
Patrick Leahy, D-VT	2001-2002	107th Congress	Both home-state Senators must return positive blue slips for committee action to proceed.[g] The chairman also, in a joint letter with the ranking committee member, declared that all blue slips would be treated as public information.[h]
Orrin Hatch, R-UT	2003-Present	108th Congress	If the chairman believes that both home-state Senators have received pre-nomination consultation from the President, the committee will proceed with the consideration of that nominee even if two negative blue slips have been returned.[i]

[a] See Charles R. Babcock, "Picking Federal Judges: Merit System v. Pork Bench," *Washington Post*, November 7, 1978, p. A4; and W. Dale Nelson and Fred S. Hoffman. Associated Press, January 25, 1979.

[b] See U.S. Congress, Committee on the Judiciary, *Selection and Confirmation of Federal Judges: Hearings Before the Senate Committee on the Judiciary*. Part I, 96th Cong., 1st Sess., (Washington: GPO, 1979), p. 4.

[c] See U.S. Congress, Senate Committee on the Judiciary, Business Meeting, unpublished committee transcript, 97th Cong., 1st Sess., 1981, p. 6. (Author's files).

[d] See Mike Robinson. Associated Press, May 19, 1989 and Sen. Joseph R. Biden, Jr., Chairman, Committee on the Judiciary, U.S. Senate, letter to President George H. W. Bush, The White House, June 6, 1989. (Author's files).

[e] Sen. Orrin G. Hatch, Chairman, Committee on the Judiciary, U.S. Senate, letter to Counsel to the President Abner J. Mikva, The White House, February 3, 1995. (Author's files).

[f] See Sen. Orrin G. Hatch, Chairman, Committee on the Judiciary, letter to Counsel to the President, Charles C. F. Ruff, The White House, April 16, 1997. (Author's files).

[g] See Elizabeth A. Palmer and Amy Fagan, "Power Shift at Judiciary Could Be Problem for Bush," *CQ Daily Monitor*, May 24, 2001, p. 3; and Elizabeth A. Palmer, "Senate GOP Backs Down From Dispute Over Handing of Nominees," *CQ Weekly*, June 9, 2001, p. 1360.

[h] Letter from Senators Patrick Leahy and Orrin Hatch, inserted material, *Congressional Record*, vol. 147, June 29, 2001. See also Helen Dewar, "Senate Reorganization Finalized; Democrats Pledge to Follow Tradition on Court Nominees," *Washington Post*, June 30, 2001, p. A11; and Audrey Hudson, "Republicans Back Bench-picks Deal; California Democrats Given Key Role," *Washington Times*, June 10, 2001, p. A03.

[i] See Jennifer A. Dlouhy, "Blue Slip or Not, Hatch Holds Judiciary Panel Hearing on Bush Court Nominee," *CQ Today*, July 31, 2003, p. 8; and Helen Dewar, "Battle Over Judges Continues," *Washington Post*, July 31, 2003, p. A17.

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