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The Blue-Slip Process in the Senate Committee on the Judiciary: Background, Issues, and Options

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Summary

The Senate Judiciary Committee's blue-slip process has received increased interest from Senators. Traditionally, the blue slip has been used by some Senators to delay, and sometimes prevent, the confirmation of persons whom they find objectionable who have been nominated as U.S. attorney, U.S. marshal, U.S. district court judge and U.S. court of appeals judge. In recent years, various changes to the blue-slip process have eliminated the traditional veto power of blue slips. This report provides a brief background on the blue-slip process, followed by an overview of current issues concerning blue slips, the debate over the need for a blue-slip policy, and recent and possible future changes to the process. This report will be updated as committee actions warrant. See also CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, by Mitchel A. Sollenberger.

Background and Overview of the Issues

The Senate Judiciary Committee's blue-slip policy has been a central component in its consideration of nominations. This policy is a Judiciary Committee custom in which the chairman seeks the assessment of nominees from home-state Senators. In practice, the chairman will send a blue-colored form to the Senators of the state where the President has nominated an individual to be either a U.S. circuit or district court judge, a U.S. marshal, or a U.S. attorney. If a home-state Senator has no objection to a nominee, a blue slip is returned to the chairman with a positive response. For a period of over 20 years (1956-1979),¹ however, if a Senator had some objection to the nominee and wanted to stop committee action, he or she could decide not to return the blue slip or to return it with a negative response. Under such circumstances the withholding of a blue slip or a single negative response would halt all further action on a nomination.

¹ For a historical account of the blue-slip process, see CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, by Mitchel A. Sollenberger.

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Over the years, the blue-slip policy has been modified to prevent a home-state Senator from having such absolute power over the fate of a nominee from the state. Today, committee action on a judicial nomination is stopped only if the President has failed to consult with the home-state Senators.

All blue slips have been made public since 2001.² Since the blue slip is not a committee rule, however, the chairman has the discretion to change the policy when deemed necessary. As a result, even if the chairman has publicly stated a blue-slip policy, he or she is not obligated to follow it. Therefore, the stated and practiced blue-slip policies can, at times, be confusing if not contradictory to one another.

In the 108th Congress, judicial nominations have experienced delays in confirmation in several instances, some of which involve blue slips. The blue-slip policy raises several important issues for the Senate today. First, it may be useful to define the blue slip in terms of how it functions in the contemporary context. Although today the blue slip only stops committee action in certain instances, for many years it was used as an absolute veto by some Senators.³ Second, even if defined as stated by the chairman, the blue-slip policy can still be difficult to understand because the stated and practiced methods of handling blue slips may not match. Third, the increased interest in blue slips has raised the issue of whether they should be used at all. Finally, scholars are discussing how the blue slip has changed and what proposals for change would work in today's confirmation process.⁴

Defense of the Blue-Slip Process. The blue slip, in its strictest form,⁵ is a mechanism that encourages the President to consult with Senators about their home-state nominations. Without a blue-slip policy the President may fail to see the need to consult a home-state Senator in the selection process.⁶ Although this is a primary argument made in support of the blue-slip policy,⁷ there are other justifications as well.

² Current 108th Congress blue slips are available at [<http://www.usdoj.gov/olp/blueslips1.html>], visited Nov. 5, 2003.

³ University of Massachusetts Professor Sheldon Goldman refers to the traditional use of the blue slip as the "silent veto." See Sheldon Goldman et al., "Clinton's Judges: Summing up the Legacy," *Judicature*, vol. 84 (Mar.-Apr. 2001), p. 238.

⁴ A number of scholars have focused on this issue. See Brannon P. Denning, "The Judicial Confirmation Process and the Blue Slip," *Judicature*, vol. 85 (Mar.-Apr. 2002); Elliot E. Slotnick, "The Changing Role of the Senate Judiciary Committee in Judicial Selection," *Judicature*, vol. 62 (May 1979); Sarah A. Binder, "Blue Slips Sink Ships: Institutionalizing Senatorial Courtesy," paper prepared for the annual meeting of the Midwest Political Science Association, Chicago, IL, Apr. 2003 (author's files).

⁵ The reference is to the blue-slip policy that allows a home-state Senator to delay or stop committee action when he or she returns a negative blue slip.

⁶ In a 1979 Senate Judiciary Committee hearing, Attorney General Griffin Bell stated, "If there were no blue slip procedure and we [the White House] wanted to send a name in, we would." See 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), p. 23.

⁷ See U.S. Senate Judiciary Committee, *Opening Statement of Senator Patrick Leahy Before* (continued...)

Some have argued that the blue slip is a senatorial responsibility that provides home-state Senators with the opportunity to make the tough decisions on judicial nominations.⁸ Another justification is that the blue slip provides home-state Senators with the power to voice concern over nominations they feel are unacceptable to them.⁹ Still others have argued that the blue slip is an institutionalized form of senatorial courtesy.¹⁰

For the most part, these arguments justify the blue slip because it appears to maximize the role of the home-state Senator in the selection of judicial nominations. The net effect of traditional use of the blue slip provides home-state Senators with more leverage to encourage the President to consult on such issues than the Senate possesses collectively.

Criticism of the Blue-Slip Process. There has been criticism of the blue-slip process. One concern is that the blue slip has been used by home-state Senators to select judges on a political, not professional, basis.¹¹ That is, if the President does not select the individual preferred by a home-state Senator, the offended home-state Senator can delay or prevent committee action on a judicial nomination for almost any personal, political, or arbitrary reason.

Such an argument has led some to believe that the blue-slip process is a perversion of what the founders intended.¹² Instead of allowing the entire Senate to fulfill its constitutional duty, a few individual Senators have improperly taken the Senate's advice and consent role and used it for their own benefit. Another argument has been made that the blue slip weakens the President's power to select judges. Still others have found that the blue slip places too many restrictions on the executive branch and does not reward the President when he does consult with home-state Senators. Finally, another argument finds that the blue slip has been transformed from a device that encourages the President

⁷ (...continued)

Judicial Nominations Hearing, April 1, 2003, p. 3 (author's files); and Brannon P. Denning, "The 'Blue Slip': Enforcing the Norms of the Judicial Confirmation Process," *William & Mary Bill of Rights Journal*, vol. 10 (Dec. 2001), p. 90.

⁸ Senator Paul Laxalt has argued, "I personally think that it would be a sad day in this committee and in the Senate for there not to be insured a senatorial prerogative, not from the standpoint of preempting anybody, but from assuming our responsibility; that is why we are here, Senators, that is, to call these tough shots within our States." See U.S. Congress, Senate Committee on the Judiciary, *The Selection and Confirmation of Federal Judges: Hearings Before the Senate Committee on the Judiciary*, p. 5.

⁹ *Ibid*, p. 5.

¹⁰ See Binder, "Blue Slips Sink Ships: Institutionalizing Senatorial Courtesy," pp. 13-23 (author's files); and CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*.

¹¹ Jonathan Turley, "Seeing Red on Blue Slips," *Los Angeles Times*, May 16, 2001, p. B13.

¹² David Cohen of Common Cause stated, "the intent of our Founding Fathers has been turned on its head by the archaic blue slip system." See U.S. Congress, Senate Committee on the Judiciary, *The Selection and Confirmation of Federal Judges: Hearings Before the Senate Committee on the Judiciary*, p. 63.

to consult with home-state Senators into a weapon that a few individual Senators use to extract unreasonable concessions.¹³

Criticism of the blue-slip policy has largely addressed the ability of home-state Senators to unduly influence the President when he selects nominations. Others feel that some Senators have improperly used the blue slip, and have therefore changed the intended nature of the confirmation process. In either case, the arguments make the point that the blue slip is an arcane practice that the Senate should consider ending.

Blue Slips as a Sustained Procedure. The enduring use of the blue slip over its more than 80-year history arguably provides proof that Senators generally support the procedure. The blue slip, in part, has sustained itself because it has been transformed into an effective tool for home-state Senators to use in the confirmation process. As one scholar explains: “The blue slip process can be seen as a type of sanction that has evolved to police observance of the confirmation process norms.”¹⁴ The sanction blue slips provide Senators is a delay or veto threat on judicial nominations against the President. Such a threat slowly evolved out of the early practice of senatorial courtesy.¹⁵ One student of the process seeks to reinforce this understanding:

[S]enatorial courtesy may have been sufficient to encourage senators to defer to the views of the home state senator from the president’s party when nominations came to the floor. But it clearly was not strong enough a threat to force the president to consult with interested senators before nominations were made. Institutionalizing senatorial courtesy in the form of a printed practice [blue slips] would have conferred a strategic advantage on home state senators from the president’s party.¹⁶

Modifications to the Blue-Slip Policy

Previous Blue Slip Changes. At the beginning of a Congress or following change in leadership, the Judiciary Committee chairman may choose to modify the blue-slip policy or leave it unchanged. Over the years, the blue slip has undergone various changes.

The blue slip originated as a tool used by committee chairmen to gather information on a nominee. Starting in 1956, Chairman James O. Eastland changed the strictly information-gathering role of the blue slip to one in which a home-state Senator could stop all action on a nomination when he or she returned a negative blue slip or failed to return one. Twenty-three years later, in 1979, Chairman Edward M. Kennedy changed

¹³ Denning, “The Judicial Confirmation Process and the Blue Slip,” p. 223.

¹⁴ “Norms” are customs that form without a binding legal rule. See Denning, “The ‘Blue Slip’: Enforcing the Norms of the Judicial Confirmation Process,” p. 92.

¹⁵ Senatorial courtesy is defined 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.” See Walter Kravitz, *Congressional Quarterly’s American Congressional Dictionary*, 3rd ed. (Washington: CQ Press, 2001), p. 231.

¹⁶ Binder, “Blue Slips Sink Ships: Institutionalizing Senatorial Courtesy,” p. 21.

the policy by informing his colleagues that when a Senator failed to return a blue slip, he would let the full committee vote on whether to proceed. In 1981, the next chairman, Senator Strom Thurmond, continued Senator Kennedy's policy, but in practice sometimes permitted the movement of a judicial nomination even when a home-state Senator returned a negative blue slip. Twenty years later, in 2001, Chairman Patrick Leahy modified the blue-slip policy to allow movement of a judicial nomination only when both home-state Senators had returned positive blue slips. Finally, in 2003, Chairman Orrin Hatch changed the blue-slip policy twice. Once, at the beginning of the 108th Congress, Chairman Hatch modified the policy to permit committee action even if a negative blue-slip was returned, provided that the President had consulted with both home-state Senators. The second instance occurred just before the 2003 August recess, when Chairman Hatch scheduled a hearing on a judicial nomination even though both home-state Senators returned negative blue slips.¹⁷

Considerations for Possible Future Blue Slip Changes. Recent proposals and the effects they might have on blue-slip policy include the following:

Abolish the Blue-Slip System Through the Use of Timetables. In late 2002, President George W. Bush proposed that the Senate be required to vote on judicial nominations not more than 12 months after a judicial vacancy occurs.¹⁸ This change would ensure that no individual Senator could indefinitely prevent Senate action on a judicial nomination. The 12-month time limit would, however, take the enforcement role played by blue slips out of the confirmation process because the Senate would be required to act on a judicial nomination within the year time frame even if the home-state Senator had presented a negative blue slip.

Institutionalize the Blue-Slip Process Through Formal Rules.¹⁹ This modification, suggested by Professor Denning, would benefit Senators by making the blue-slip policy clearer because the Judiciary Committee would agree to a blue-slip rule each Congress. If the blue-slip process were more transparent, Denning contends, it would lessen the need for Senators to use outside sources (which tend to give conflicting histories of the blue slip) to gain institutional or historical knowledge of blue slips. On the other hand, by creating a blue-slip rule, others say, the process of modifying the blue-slip policy for special or unique circumstances may become too difficult to accomplish, thus diminishing the blue slip's flexibility and reducing its value. In addition, the committee might have difficulty in securing approval for a blue-slip rule each Congress.

Modify the Blue Slip to Function as a Request Only. This change would allow the Judiciary Committee to use the blue slip as a way to obtain information about a judicial nominee from home-state Senators without the process remaining an automatic block to committee action. For more than 30 years, the Judiciary Committee used the

¹⁷ Chairman Hatch has not referred to this incident as a change in his blue-slip policy. Therefore, it is not clear if this modification is a one-time change or something more permanent.

¹⁸ For more information on President Bush's proposal, see CRS Report RS21506, *Implications for the Senate of President Bush's Proposal on Judicial Nominations*, by Betsy Palmer.

¹⁹ Denning suggests "memorializ[ing] the custom in a Senate [rule], or at least a Judiciary Committee rule." See Denning, "The Judicial Confirmation Process and the Blue Slip," p. 226.

blue-slip policy in this fashion.²⁰ As a Senator reportedly once stated, the blue slip is “useful to the Committee for getting to know things. Utilized in the right way it can aid in developing information.”²¹ Some observers have noted that, as with the timetable alternative, this modification would take the enforcement mechanism²² out of the hands of home-state Senators. The President would then be free, they say, to select anyone regardless of the views of the home-state Senator.

²⁰ CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, pp. 8-9.

²¹ Quoting from unnamed Senator. See Elliot E. Slotnick, “Reforms in Judicial Selection: Will They Affect the Senate’s Role?” *Judicature*, vol. 64, Aug. 1980, p. 71.

²² When using the phrase “enforcement mechanism” this report is referring to Denning’s conclusion that the blue slip “functions as a mechanism to sanction a failure by the president to seek senators’ *advice* on judicial nominees, not just their *consent*.” See Denning, “The ‘Blue Slip’: Enforcing the Norms of the Judicial Confirmation Process,” p. 75.

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