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What the Blue Slip Process Means for Trump's Judicial Nominations

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President Donald Trump inherited more than 120 vacancies on the lower federal courts and one Supreme Court vacancy when he took office on January 20, 2017. Trump made filling the Supreme Court vacancy one of his first priorities, and Neil Gorsuch was confirmed by the Senate in time to join the Court for the end of its 2016–2017 term. Now the President's focus has turned to the appellate and district court vacancies. The Senate confirmed Trump's first appeals court nominee, Amul Thapar, to the U.S. Court of Appeals for the Sixth Circuit on May 25.

As of June 7, Trump had nominated 16 individuals to various federal district and appeals courts. While Trump might have believed his lower court nominees would sail through their Senate confirmations, they are likely to encounter aggressive resistance by Senate Democrats. In 2013, the Senate eliminated the filibuster as a tool for delaying or stopping the confirmation of lower court judges, so Senate Democrats may view the blue slip process as the best option for obstructing the President's nominations. What are blue slips, and how might Senate Republicans prevent potential abuses of the process?

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The Senate's Role in the Appointments Process

The Framers of the Constitution hotly debated how our third branch of government would be filled. One camp, including John Adams, thought the Senate should not be involved in the appointments process,[1] but proponents of dividing the responsibility between the President and the Senate prevailed. Alexander Hamilton explained in *Federalist* No. 76 that the Senate would act as "an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters."[2] Thus, Article II, Section 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States."[3]

Beyond providing advice and consent, the Constitution does not offer any further detail about the Senate's role in the process. It is clear, however, that Senators are not obligated to confirm every nominee. This was evident from as early as 1795, when the Senate rejected George Washington's nomination of John Rutledge to be chief justice of the Supreme Court. Senators should take their role in the process seriously and evaluate the qualifications, background, and judicial philosophy of nominees, rather than rubberstamping any President's nominees.

The Senate has developed a variety of traditions and practices related to the confirmation of federal judges. Since the early twentieth century,[4] the Chairman of the Senate Judiciary Committee—the committee responsible for evaluating judicial nominees before they are sent to the full Senate—has sent let-

ters on blue paper ("blue slips") to senators from a nominee's home state asking them to approve or object to the nomination. If the home-state senators refuse to assent to the nomination, it might not move forward in the Committee. The use of blue slips developed out of the senatorial courtesy—the tradition that home-state senators will be consulted on selection of a nominee and may block objectionable nominees—dating back to George Washington's Administration.[5] This recognizes that home-state senators may be more familiar with the nominee and have better insights into the nominee's suitability for the position.

In the past, senators took to the Senate floor to declare a nomination "personally obnoxious." In 1939, Senator Harry Byrd (D–VA) objected to President Franklin Delano Roosevelt's nomination of a district court judge in Virginia without first seeking the input of the two Virginia Senators. Byrd declared, "It is my sincere and honest conviction that this nomination was made for the purpose of being personally offensive to the Virginia Senators, and it is personally offensive to the Virginia Senators, and is personally obnoxious to me, as well as to my colleague."[6] The Senate voted 72–9 against confirmation. Today, Senators of the President's party will typically seek to influence the selection of nominees and make their displeasure known before an "obnoxious" nomination is made. The minority party, however, must often resort to *post hoc* tools such as the use of blue slips and other procedural maneuvers.

Senate Minority's Influence on Nominations

Understandably, when one party holds both the presidency and a majority of the Senate, the minority party may seek to use the blue slip process as a way to prevent nominees from advancing. In fact, there have already been suggestions that Democratic Senators may withhold their blue slips for two of President Trump's nominees. Trump nominated Joan Larsen of Michigan to the U.S. Court of Appeals for the Sixth Circuit and David Stras of Minnesota to the U.S. Court of Appeals for the Eight Circuit, and both states are represented by two Democrats in the Senate. Both of these nominees were included in the list of possible Supreme Court nominees that Trump produced during his presidential campaign. In a press release following Stras' nomination, Senator Al Franken (D–MN) indicated his displeasure with the President for having sought input from conservative organizations, rather than him, in selecting a nominee.[7]

Senators have been able to use the threat of withholding a blue slip to persuade the President to select home-state senators' preferred nominees. For example, Georgia Senators Johnny Isakson and Saxby Chambliss struck a deal with President Barack Obama over seven judicial nominations in 2013. Isakson and Chambliss returned their blue slips on all seven in exchange for Obama nominating one individual they supported—although their preferred nominee was ultimately not confirmed. If Senate Democrats are not able to influence President Trump's selection process—which seems to be the case with his early judicial nominations—they may seek to use the blue slip process to stop nominees from advancing.

The Senate Democrats eliminated the use of the filibuster against lower court nominations (and executive branch nominations) in 2013, so they now have

1. John Adams, "Letter to Thomas Jefferson," December 6, 1787, https://founders.archives.gov/documents/Adams/99-02-02-0281 (accessed June 15, 2017). Adams wrote, "I would therefore, have given more power to the President, and less to the senate. The nomination and appointment to all offices I would have given to the President, assisted only by a privy council of his own creation; but not a vote or voice would I have given the Senate or any senator unless he were of the privy council. Faction and distraction are the sure and certain consequences of giving to the senate a vote on the distribution of offices."
2. Alexander Hamilton, *The Federalist*, No. 76 (Carey and McClellan, 2001), p. 394.
3. U.S. Constitution, Article II, §2, https://usconstitution.net/xconst_A2Sec2.html (accessed June 15, 2017).
4. See Mitchel A. Sollenberger, "The History of the Blue Slip in the Senate Committee on the Judiciary, 1917–Present," Congressional Research Service *Report for Congress*, October 22, 2003, https://www.everycrsreport.com/reports/RL32013.html (accessed June 15, 2017).
5. See Betsy Palmer, "Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History," Congressional Research Service *Report for Congress*, June 5, 2003, https://fas.org/sgp/crs/misc/RL31948.pdf (accessed June 15, 2017). "Senators rebuffed President George Washington on his nomination of Benjamin Fishbourn to be a naval officer of the Port of Savannah, Georgia.... After Fishbourn was rejected, Washington submitted the individual preferred by the Georgia Senators, who was promptly confirmed."
6. Ibid.
7. News release, "Statement on Trump Nomination of Minnesota Supreme Court Justice David Stras for the Eighth Circuit," Senator Al Franken, May 8, 2017, https://www.franken.senate.gov/?p=press_release&id=3693 (accessed June 15, 2017).

one less tool for blocking or delaying the confirmation of judges.[8] Thus, the Senate Democrats may see blue slips as the best opportunity for trying to prevent President Trump from filling vacancies on the federal courts. What can Senate Republicans do to ensure the confirmation of nominees who will be faithful to the Constitution?

Evolution of the Blue Slip

The practice of using blue slips is not a formal rule of the Senate. It is a policy developed by the Chairman of the Senate Judiciary Committee, and throughout its history, the practice has varied depending on the chairman. The Congressional Research Service places the first recorded blue slip in 1917 when Senator Thomas W. Hardwick (D–GA) objected to President Woodrow Wilson's nomination of U. V. Whipple to the Southern District of Georgia. Senator Charles A. Culberson (D–TX) chaired the Senate Judiciary Committee, and though the negative blue slip did not stop the committee from evaluating Whipple, his nomination was nevertheless rejected by the Senate.[9] This first blue slip stated, "Sir: Will you kindly give me, for the use of the Committee, your opinion and information concerning the nomination of...", and five years later, Chairman Knute Nelson (R–MN) added a time limit, requiring a response within one week, otherwise assuming the home-state senators did not object to the nomination.[10] Some form of a time limit remained until 1998.

From 1917 until 1955, the return of a negative blue slip did not prevent the Judiciary Committee from continuing with its consideration of a nominee. Starting in 1956, Chairman James O. Eastland (D–MS) treated the return of one negative blue slip or the failure to return a blue slip as a veto on the nomination, effectively terminating it. Then in 1979, Chairman Ted Kennedy (D–MA) changed course so that the failure to return a blue slip "within a reasonable time" would not bar the Committee from proceeding with its evaluation of the nominee. He also did not treat the return of one negative blue slip as a veto in all instances, and instead gave himself the discretion to decide when to proceed notwithstanding a negative blue slip. The next chairman, Senator Strom Thurmond (R–SC), treated blue slips in substantially the same way.

In 1989, Chairman Joe Biden (D–DE) instituted a new policy, stating in a letter to President George H. W. Bush, "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 consideration of that nominee unless the Administration has not consulted with both home state Senators."[11] Chairman Orrin Hatch (R–UT) continued this practice until 2001. During this period, the chairmen pressed for pre-nomination consultation with home-state senators.

Since 2001, the Senate Judiciary Committee has vacillated between requiring positive blue slips from both home-state senators (starting with Chairman Patrick Leahy (D–VT)) and the prior "substantial weight" standard, depending on whether the Senate majority aligned with the President. Chairmen during this period have encouraged the administrations to consult with home-state senators before making a nomination, although the failure to do so has not always prevented nominees from advancing through the Committee. Today, Chairman Charles Grassley (R–IA) faces the prospect of having dozens of nominations piling up in his committee, and he will have to decide how to proceed.

Options for Preventing Abuse of Blue Slips

Chairman Grassley has several options based on the Senate Judiciary Committee's past usage of blue slips that honor the senatorial courtesy while not allowing Senate Democrats to abuse the process to prevent action on all judicial nominations coming from states with one or two Democrat Senators.

Option 1: Give negative blue slips substantial weight, but do not treat them as barring the Committee from continuing with its evaluation of nominees. Several past chairmen from both parties have used blue slips in this way.

8. In April 2017, Senate Republicans eliminated the filibuster for Supreme Court nominees.
9. Ibid., pp. 5–7.
10. Ibid., p. 6.
11. Ibid., pp. 13–14. This was put into practice later that year with the nomination of Vaughn Walker to a federal district court in California. Senator Alan Cranston (D–CA) returned a negative blue slip, but the committee continued with its consideration of Walker's nomination, and he was ultimately confirmed.

Option 2: Put a definitive time limit on when Senators must return a blue slip—as Nelson did starting in 1922—or at least follow Kennedy's policy that the failure to return a blue slip may be viewed as not objecting to the nomination.

Option 3: Give more weight to home-state Senators' blue slips for district court nominees than appeals court nominees. Customarily, home-state Senators have played a larger role in the selection of district court nominees. While appeals court judges are based in one state, they hear cases from all the states within their circuit. District court judges, on the other hand, hear only cases from the state where they sit. Thus, home-state Senators' opinions are more relevant for district court nominees. Grassley suggested in an interview with Roll Call that he might take this approach.[12]

Option 4: Eliminate the use of blue slips. This suggestion comes up frequently when one party holds the White House and the Senate, such as when President Obama's supporters argued that Leahy should have done away with the practice in 2014. Grassley may recognize that removing this tool would hinder a future Republican minority's efforts to stop the confirmation of radical nominees made by a Democratic President.

Conclusion

The Senate Judiciary Committee's use of blue slips has been in place for 100 years, and chairmen have resisted calls to eliminate the practice when it is politically expedient for their party. A manifestation of senatorial courtesy, blue slips allow home-state Senators to voice their opinions on judicial nominations early in the process.

President Trump entered office with more than 120 vacancies on the federal district and appeals courts, so the Senate Judiciary Committee will have numerous nominations to consider in the near future. If Senate Democrats try to abuse the blue slip process, Chairman Grassley has several options to ensure they are not able to prevent the confirmation of constitutionalist judges.

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12. Niels Lesniewski, "Grassley Signals Deference to White House on Circuit Judges," Roll Call, May 11, 2017, http://www.rollcall.com/news/politics/grassley-shows-flexibility-blue-slips-appellate-vacancy (accessed June 15, 2017).