

# ISSUE BRIEF

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## Blue Slips for Judicial Nominations: Veto vs. Input

*Thomas Jipping*

Four nominees to the U.S. Court of Appeals have become controversial because of an important, but often misunderstood, feature of the judicial confirmation process. That feature, called the “blue-slip” courtesy, highlights the views of Senators from a state in which a judicial nominee would serve. A dispute has arisen regarding whether the views of those home-state Senators should dictate, or merely influence, whether the Senate considers these nominees. More specifically, the question is whether a negative or withheld blue slip should be treated as a veto or as input. Any means of highlighting the views of home-state Senators about judicial nominees is a courtesy and not required by any Senate rule. Each Judiciary Committee chairman, therefore, is free to decide whether, and how, to incorporate those views into the confirmation process.

The blue-slip courtesy, by which home-state Senators traditionally expressed their views on a blue piece of paper, was established in 1917 to play an “advisory role” for the Judiciary Committee and Senate.<sup>1</sup> Since then, only two of 19 chairmen have treated it as a veto rather than as input. Current Chairman Charles Grassley (R-IA) is following the approach he outlined for the blue-slip courtesy, which mirrors that of chairmen from both parties, including Senator Orrin Hatch (R-UT; 1995–2000 and 2003–2004) and

then-Senator Joseph Biden (D-DE; 1987–1994). He will hold a hearing for nominees if the White House has adequately consulted with home-state Senators.

### The Nominees

Four of President Donald Trump’s nominees to the U.S. Court of Appeals have become controversial because one or both of their home-state Senators have declined to return a blue slip.<sup>2</sup> Chairman Grassley decided to hold a hearing for each of them after being satisfied that those Senators had been adequately consulted, and three have so far been confirmed.

**David Stras (Eighth Circuit).** President Trump first nominated Stras to the Eighth Circuit on May 8, 2017. Stras had served on the Minnesota Supreme Court since 2010, after practicing or teaching law since 2003. He received his law degree from the University of Kansas in 1999 and served as a law clerk for judges on the Ninth and Fourth Circuits and for Supreme Court Justice Clarence Thomas. On January 29, 2018, the Senate voted 57–41 to end debate and the next day voted 56–42 to confirm the nomination. Then-Senator Al Franken (D-MN) did not support Stras.

**Michael Brennan (Seventh Circuit).** President Trump first nominated Brennan to the Seventh Circuit on August 3, 2017. Over the previous two decades, Brennan had practiced law as well as served as an Assistant District Attorney and a county circuit court judge. He received his law degree from Northwestern University and served as a law clerk for a judge on the Seventh Circuit and a judge on the U.S. District Court in Wisconsin. On May 9, 2018, the Senate voted 49–47 to end debate and the next day voted 49–46 to confirm the nomination. Senator Tammy Baldwin (D-WI) did not support Brennan.

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This paper, in its entirety, can be found at <http://report.heritage.org/ib4858>

**The Heritage Foundation**  
214 Massachusetts Avenue, NE  
Washington, DC 20002  
(202) 546-4400 | [heritage.org](http://heritage.org)

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**Ryan Bounds (Ninth Circuit).** President Trump first nominated Bounds on September 7, 2017. Bounds had served as an Assistant U.S. Attorney in Portland, Oregon, since 2008, after practicing or serving in the Justice Department since 2000. He received his law degree from Yale in 1999 and served as a law clerk for a judge on the Ninth Circuit. The Judiciary Committee held a hearing on his nomination on May 9, 2018. Senators Ron Wyden (D-OR) and Jeff Merkley (D-OR) do not support Bounds.

**David Porter (Third Circuit).** President Trump nominated Porter to the Third Circuit on April 12, 2018. Porter has practiced law in Pittsburgh, Pennsylvania, since 1994. He received his law degree from George Mason University in 1992 and served as a law clerk to a judge on the Third Circuit.

Senator Robert Casey (D-PA) does not support Porter.

### The Blue-Slip Courtesy

The Constitution gives to the President the power to nominate and, subject to the “advice and consent” of the Senate, to appoint officials to positions in the executive and judicial branches. After a judicial nomination is made, Judiciary Committee Chairmen solicit the views of individual Senators about the nominee who would serve in their state. The Congressional Research Service describes this practice, which began in 1917, as an “informal custom” that has become a “central component” of how the committee handles judicial nominations.<sup>3</sup>

Conflicts over the blue-slip courtesy arise when one or both home-state Senators signal opposition to a

judicial nominee by submitting a negative blue slip or withholding one altogether. Those Senators typically insist that a withheld or negative blue slip should veto the nomination and prevent even Judiciary Committee consideration. Since the courtesy is neither mandated nor guided by any Senate rule, however, each chairman decides whether and how to incorporate the views of home-state Senators into the process.

Political scientists Sarah Binder and Forrest Maltzman describe the creation of the blue-slip courtesy as “an early warning system, not an absolute veto.”<sup>4</sup> In other words, “a negative blue slip provided information to the chair about the potential for strong floor opposition should the nomination be reported favorably from the Judiciary Committee.”<sup>5</sup>

From 1917 to 1955, under five Democrat and six Republican chairmen, home-state Senators were given the opportunity to testify before the Judiciary Committee in a nominee’s confirmation hearing. A negative blue slip, however, “was not intended to prevent committee action.”<sup>6</sup> In other words, the blue-slip courtesy highlighted the views of home-state Senators but did not control the process.

Senator James Eastland (D-MS) chaired the Judiciary Committee from 1956 to 1978. Unlike his predecessors, he treated negative or withheld blue slips as “absolute vetoes by Senators”<sup>7</sup> that would prevent any committee consideration. Some scholars have said that Chairman Eastland, who began leading the committee during the Eisenhower Administration, converted the blue slip to a veto so that some southern Senators could prevent consideration of judicial nominees who might favor racial desegregation.<sup>8</sup>

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1. Ian Millhiser, “The Imaginary Rule That Keeps Obama’s Judges from Being Confirmed,” Think Progress, April 17, 2014, <https://thinkprogress.org/the-imaginary-rule-that-keeps-obamas-judges-from-being-confirmed-2926a0c0452f/> (accessed May 23, 2018).
  2. For more on how the controversy over blue slips might impact President Trump’s nominees, see Elizabeth Slattery, “What the Blue Slip Process Means for Trump’s Judicial Nominations,” Heritage Foundation *Issue Brief* No. 4718, June 16, 2017, <https://www.heritage.org/courts/report/what-the-blue-slip-process-means-trumps-judicial-nominations>.
  3. Mitchel A. Sollenberger, *The History of the Blue Slip in the Senate Committee on the Judiciary*, Congressional Research Service Report for Congress No. RL32013, October 22, 2003, summary, <https://fas.org/sgp/crs/misc/RL32013.pdf> (accessed May 23, 2018).
  4. Sarah A. Binder & Forrest Maltzman, *Advice and Dissent: The Struggle to Shape the Federal Judiciary* (Washington, DC: Bookings Institution Press, 2009), p. 52.
  5. *Id.* at 50.
  6. Sollenberger, *The History of the Blue Slip*, pp. 9–10. See also Binder and Maltzman, *Advice and Dissent*, p. 50 (“Before 1956...negative blue slips were treated as advisory to the committee and the full chamber, rather than as a single-handed committee veto exercised by a home state senator.”).
  7. Sollenberger, *The History of the Blue Slip*, p. 9.
  8. See Tuan Samahon, “Federal Judicial Selection and the Senate’s Blue Slip ‘Tradition,’” *Nevada Lawyer* October 2012, p. 12, [https://www.nvbar.org/wp-content/uploads/NevLawyer\\_Oct.\\_2012\\_BlueSlips-1.pdf](https://www.nvbar.org/wp-content/uploads/NevLawyer_Oct._2012_BlueSlips-1.pdf) (accessed May 23, 2018), and Jonathan Turley, “Time for Congress to End the Abusive ‘Blue Slip’ Process,” *The Hill*, November 14, 2017, <http://thehill.com/opinion/judiciary/360328-time-for-chuck-grassley-to-end-the-abusive-blue-slip-nominee-system> (accessed May 23, 2018).
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Chairman Ted Kennedy (D-MA) criticized the “one-member veto”<sup>9</sup> and instead allowed the committee to decide whether to consider a nominee who lacked support of either home-state Senator.<sup>10</sup> Chairman Strom Thurmond (R-SC) treated a withheld blue slip as no objection<sup>11</sup> and held hearings on multiple nominees to the U.S. District Court over the negative blue slip of one or both home-state Senators.<sup>12</sup>

Chairman Joe Biden offered the clearest rejection of the blue-slip courtesy as a single-Senator veto. In a letter to President Ronald Reagan in June 1989, he stated that a negative blue slip is a “significant factor to be weighed by the committee...but it will not preclude consideration of that nominee unless the Administration has not consulted with both home state Senators prior to submitting the nomination to the Senate.”<sup>13</sup> Like Chairman Thurmond, he held a hearing for a U.S. District Court nominee over the negative blue slip of a home-state Senator.<sup>14</sup>

Chairman Orrin Hatch (R-UT) wrote President Bill Clinton in February 1995 stating that he would follow the “policy as articulated and practiced by Senator Biden in 1989.”<sup>15</sup> He repeated this position in the spring of 2001, saying that a negative blue slip would not be an automatic single-Senator veto.<sup>16</sup>

Like Chairman Eastland, Chairman Patrick Leahy (D-VT) changed the blue slip into a single-Senator veto, requiring two positive blue slips for the

committee to consider a nomination.<sup>17</sup> This was not Chairman Leahy’s only departure from past blue-slip practice. For the first time by any Chairman, for example, he used a negative blue slip from Senators in one state to stop consideration of nominees from another state.<sup>18</sup>

Finally, current Chairman Charles Grassley has returned to the approach taken by Chairmen Biden and Hatch. On May 9, 2018, for example, he said on the Senate floor that “[n]egative or unreturned blue slips will not necessarily preclude the hearing for circuit court nominees unless the White House failed to consult with home state Senators.”<sup>19</sup>

As Chairman Grassley has put it, the “blue slip courtesy is just that—a courtesy.”<sup>20</sup> Seventeen of the 19 Judiciary Committee chairmen since it was established have treated it as input rather than a single-Senator veto. In recent decades, their explicit emphasis has been on the need for White House consultation with home-state Senators.<sup>21</sup>

### **Weaponizing the Blue Slip?**

Having clarified the nature and application of the blue-slip courtesy, we can apply those standards to the David Stras, Michael Brennan, Ryan Bounds, and David Porter nominations. In each case, the White House spent considerable time and effort consulting with the home-state Senators before making a nomi-

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9. Sollenberger, *The History of the Blue Slip*, p. 11.

10. *Ibid*, p. 10.

11. *Ibid*, p. 12.

12. Chairman Thurmond, for example, held a hearing in 1983 on the nomination of John Vukasin to the U.S. District Court for the Northern District of California, over the objection of Senator Alan Cranston (D-CA), and in 1985 on the nomination of Albert Moon to the U.S. District Court for the District of Hawaii over the objection of Senators Daniel Inouye (D-HI) and Spark Matsunaga (D-HI). *Ibid*, pp. 12-13.

13. Quoted *id.* at 13-14.

14. Chairman Biden, for example, held a hearing in 1989 on the nomination of Vaughn Walker to the U.S. District Court for the Northern District of California over the objection of the late Senator Alan Cranston (D-CA). *Ibid*, p. 14.

15. Quoted *ibid*, p. 15.

16. *Ibid*, pp. 17-18. Chairman Arlen Specter (R-PA) does not appear to have a clearly articulated policy for implementing the blue-slip courtesy. A list of blue-slip policies maintained by the Ohio State University Political Science Department indicates that he distinguished between district and appeals court nominees and that a negative blue slip would not necessarily veto the latter. Blue Slip Senate Archive, “Judiciary Committee Chair Blue Slip Policies,” <https://blueslips.osu.edu/policy.php> (accessed May 23, 2018).

17. Sollenberger, *The History of the Blue Slip*, p. 20.

18. *Ibid*, p. 20-21. Chairman Leahy used the negative blue slips from Michigan Senators Carl Levin (D) and Debbie Stabenow (D) to stop consideration of U.S. Court of Appeals nominees from the other states in the Sixth Circuit.

19. *Congressional Record*, May 9, 2018, p. S2567. See also Charles E. Grassley, “100 Years of the Blue Slip Courtesy,” *The Hill*, November 15, 2017.

20. *Congressional Record*, May 9, 2018, p. S256; *Congressional Record*, November 16, 2017, p. S7285.

21. Chairman Grassley has repeatedly detailed the history of the blue-slip courtesy and described his own blue-slip policy. See, e.g., *Congressional Record*, November 13, 2017, pp. S7174-75, and *Congressional Record*, May 9, 2018, pp. S2567-68.

nation. The demand that, despite such consultation, they should still be able to veto a nomination is out of step with how the blue-slip courtesy has been implemented for nearly all of the past century. It is instead, as Senator Orrin Hatch has said, an effort to “weaponize the blue slip.”<sup>22</sup>

Many of the Senators and grassroots activists who now call for turning the blue-slip courtesy into a single-Senator veto were calling for its elimination under President Barack Obama. In early 2013, for example, liberal grassroots activists criticized the blue-slip courtesy as a “relic” and a legacy of “the old patronage system.”<sup>23</sup> One writer urged Chairman Leahy to abandon his single-Senator veto and return to Chairman Hatch’s policy emphasizing consultation, the same policy Chairman Grassley follows today.<sup>24</sup>

In November 2013, Democrats succeeded in eliminating another means of preventing judicial confirmations. Senate Democrats had prevented confirmation votes by filibustering President George W. Bush’s appeals court nominees nearly two dozen times between March 2003 and July 2004. Senate Republicans did the same just seven times in the first five years of the Obama Administration. Even though filibusters had declined significantly by late 2013, Majority Leader Harry Reid (D–NV) claimed that the confirmation process had become “completely unworkable.”<sup>25</sup> On November 21, 2013, Democrats used a parliamentary ruling, affirmed by a 52–48 Senate vote, to abolish filibusters of all but Supreme Court nominations.

Days after abolishing nomination filibusters, liberal activists returned to attacking the blue-slip courtesy. Writer Jeffrey Toobin, for example, dis-

missed the blue-slip courtesy as “an arcane senatorial tradition” and called it the “one remaining barrier to [President Obama’s] ability to fill vacancies in the federal courts.”<sup>26</sup> A few months later, the *New York Times* editorial board called for eliminating the blue-slip courtesy, calling it “an anti-democratic power never contemplated in the Constitution.”<sup>27</sup>

That was in 2013, with a Democratic president. This is 2018, with both a Republican President and Senate. The Ryan Bounds nomination shows the reality of how the blue-slip courtesy is being treated in the 115th Congress. The same day that President Trump nominated Bounds, Senators Wyden (D–OR) and Jeff Merkley (D–OR) wrote White House Counsel Donald McGahn that they “cannot return a blue slip on a judicial nominee that has not been approved by our bipartisan judicial selection committee.”<sup>28</sup> On February 12, 2018, Senators Wyden and Merkley again wrote McGahn acknowledging that Bounds had, in fact, been one of the four candidates for the Ninth Circuit ranked highest by their selection committee.<sup>29</sup> They still refused to return their blue slips.

## Conclusion

Last fall, Heritage scholars Tiffany Bates and Elizabeth Slattery flagged the blue-slip courtesy as a tactic for confirmation obstruction.<sup>30</sup> On November 16, 2017, Chairman Grassley said, “I will not allow the White House to just steamroll home State Senators, but, as I have said all along, I will not allow the blue-slip process to be abused.”<sup>31</sup> In other words, he will treat the blue-slip courtesy as input, not as a veto. By moving forward with consideration of these four

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22. *Congressional Record*, October 31, 2017, p. S6903.

23. Ian Millhiser, “How an Absurd Senate Rule Kept a Powerful Judgeship Open for 1000 Days and Counting,” <https://thinkprogress.org/how-an-absurd-senate-rule-kept-a-powerful-judgeship-open-for-1000-days-and-counting-85294d6b5886/> (accessed May 23, 2018).

24. *Ibid.*

25. *Congressional Record*, November 21, 2013, p. S8414.

26. Jeffrey Toobin, “Blue-Slip Battle: The Senate Obstructionists’ Secret Weapon,” *The New Yorker*, November 26, 2013, <https://www.newyorker.com/news/daily-comment/blue-slip-battle-the-senate-obstructionists-secret-weapon> (accessed May 23, 2018).

27. Editorial, “The Senate’s Discourtesy to Judges,” *New York Times*, March 30, 2014, <https://www.nytimes.com/2014/03/31/opinion/the-senates-discourtesy-to-judges.html> (accessed May 23, 2018).

28. That letter is available at <http://static.politico.com/59/2a/f5b886e44d6ba505b1551125a32e/wh-judicial-vacancy-signed.pdf>.

29. That letter is available at <http://eppc.org/wp-content/uploads/2018/05/OR-Signed-Judicial-Candidates-Letter.pdf>.

30. Tiffany Bates and Elizabeth Slattery, “Trump’s Blue Slip Problem,” *Heritage Foundation Commentary*, September 27, 2017, <https://www.heritage.org/courts/commentary/trumps-blue-slip-problem>.

31. *Congressional Record*, November 16, 2017, p. S7285.

appeals court nominees, Chairman Grassley is keeping his word and implementing the blue-slip courtesy consistent with its origin and traditional application.

—**Thomas Jipping** is Deputy Director and Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation.