

MEMORANDUM TO NEWS MEDIA

TO: Members of the news media
FROM: Senate Judiciary Committee Majority
Date: November 2, 2017
RE: History and Context of the Blue Slip Courtesy

Highlights:

- The blue slip process is a courtesy extended by Committee chairmen, not a binding Senate rule.
- Since the blue slip courtesy was created in 1917, only two chairmen (Sens. James Eastland and Patrick Leahy) had strict policies requiring two positive blue slips from home-state senators before the Judiciary Committee would consider a nomination.
- In 25 of the 36 years before Senator Grassley became Chairman, chairmen have allowed hearings on nominees despite negative or unreturned blue slips.
- The same senators who changed the Senate rules to ignore the views of 41 senators *after* evaluating a nominee now want to enable a single senator to block a nomination *before* the Committee can even review the nominee's background and qualifications.

History of Blue Slip Courtesy

The blue slip represents an aspect of senatorial courtesy premised on an understanding that home-state senators are in a good position to provide insights into a nominee from their home state. Throughout its 100-year history, Senate Judiciary Committee chairmen have applied the courtesy differently. However, a vast majority of chairmen have *not* required two positive blue slips as a prerequisite for further consideration by the Committee.

Only two Chairmen—Senators James Eastland and Patrick Leahy—strictly required positive blue slips from both home-state senators before proceeding on a nomination. Senators Edward Kennedy, Strom Thurmond, Joseph Biden, and Orrin Hatch adopted policies that were more consistent with pre-Eastland policies, in which the lack of two positive blue slips did not necessarily prevent action on a nomination. (Senator Arlen Specter did not announce a blue slip policy during his two-year tenure as Chairman.) But Senators Biden and Hatch also emphasized the need for the White House to have engaged in consultation with home-state senators before they would allow a nomination to proceed without two positive blue slips.

1917 – 1956 | All 11 Chairmen



Committee could consider nominees with a negative or unreturned blue slip

The blue slip was instituted during the 65th Congress by the Chairman of the Senate Judiciary Committee to obtain the opinions of senators on the nominees to federal courts located in their home states.¹ The policy of all 11 chairmen for the next nearly forty years was that the return of a negative blue slip did not

¹ Mitchel A. Sollenberger, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, Congressional Research Service 8 (Oct. 22, 2003).

preclude the Committee’s further consideration of a nominee.² For example, in 1917, Senator Thomas Hardwick of Georgia returned a negative blue slip on a nominee for the Southern District of Georgia. The Committee nevertheless reported the nominee negatively to the Senate, where the nominee was rejected.³ In 1936, Senator Theodore Bilbo of Mississippi objected to a Fifth Circuit nominee, but the Committee nevertheless reported the nominee to the Senate, where he was confirmed.⁴

1956 – 1978 | Chairman James O. Eastland



Allowed a negative or unreturned blue slip to block a nominee

Chairman James O. Eastland changed the Committee’s blue slip policy so that a negative blue slip or the failure to return a blue slip by one home-state senator was considered an absolute veto of a nomination.⁵

It is not precisely clear why Chairman Eastland adopted this policy. But some scholars maintain that its purpose was to empower federal courts in the South to resist implementation of *Brown v. Board of Education*. Villanova Law Professor Tuan Samahon explains, “[w]hen segregationist ‘Dixiecrat’ Senator John Eastland chaired the Judiciary Committee, he endowed the blue slip with veto power to, among other things, keep Mississippi’s federal judicial bench free of sympathizers with *Brown v. Board of Education*.”⁶ Because the Supreme Court “largely delegated the task of implementing *Brown* to local federal trial judges . . . it mattered a great deal who sat on federal district courts in the segregated South.”⁷

1979 – 1981 | Chairman Edward M. Kennedy



Committee could consider nominees with a negative or unreturned blue slip

The blue slip policy was again revised under Chairman Edward M. Kennedy. During a Committee hearing in 1979, he stated:

*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 notwithstanding the absence of the blue slip.*⁸

Chairman Kennedy did not articulate an express policy with respect to negative blue slips, but there is at least one example of the Committee moving on a nominee despite the return of a negative blue slip.

² *Id.*

³ Mitchel A. Sollenberger, *The Blue Slip: A Theory of Unified and Divided Government, 1979-2009*, Congress & the Presidency (Vol. 37, Iss. 2) 127 (2010).

⁴ Sollenberger (2003) at 8.

⁵ *Id.* at 9.

⁶ Tuan Samahon, *Federal Judicial Selection and the Senate’s Blue Slip “Tradition”*, Nevada Lawyer 12 (Oct. 2012).

⁷ Ian Millhiser, *The Imaginary Rule That Keeps Obama’s Judges From Being Confirmed*, ThinkProgress (Apr. 17, 2014), available at <https://thinkprogress.org/the-imaginary-rule-that-keeps-obamas-judges-from-being-confirmed-2926a0c0452f/>.

⁸ Sollenberger (2003) at 10-11.

Senator Harry F. Byrd, Jr. returned a negative blue slip for a Virginia judicial nominee, but Senator Kennedy nevertheless held a hearing.⁹

1981 – 1987 | Chairman Strom Thurmond



Committee could consider nominees with a negative or unreturned blue slip

Chairman Strom Thurmond announced that he would continue Senator Kennedy's blue slip policy and clarified that he would assume a blue slip that remained unreturned after seven days meant there was no objection.¹⁰ Chairman Thurmond proceeded on several nominees when senators returned negative blue slips:

- In 1981, the Committee held a hearing and moved John Shabaz to the Senate despite a negative blue slip from Senator William Proxmire of Wisconsin. Shabaz was confirmed to a district court seat.
- In 1982, the Committee held a hearing and moved John L. Coffey to the Senate despite a negative blue slip from Senator Proxmire. Coffey was confirmed to the Seventh Circuit.
- In 1983, the Committee held a hearing and reported the nomination of John P. Vukasin, Jr. despite California Senator Alan Cranston returning a negative blue slip. The Senate ultimately confirmed Vukasin to a district court seat.
- In 1985, the Committee held a hearing on the nomination of Albert I. Moon, Jr. despite both Hawaii senators returning negative blue slips.¹¹

1987 – 1995 | Chairman Joseph R. Biden, Jr.



Committee could consider nominees with a negative or unreturned blue slip

Chairman Biden articulated his blue slip policy in a letter to President George H.W. Bush shortly after his inauguration:

*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 prior to submitting the nomination to the Senate.*¹²

Chairman Biden proceeded on the nomination of Bernard Siegan to the Ninth Circuit despite Senator Cranston's return of a negative blue slip.¹³ The Committee rejected Siegan's nomination by an 8-6 vote. Likewise, Chairman Biden proceeded on the nomination of Vaughn R. Walker despite Senator Cranston's

⁹ *Id.* at 11.

¹⁰ Sollenberger (2003) at 12.

¹¹ Sollenberger (2010).

¹² Sollenberger (2003) at 14-15.

¹³ Sollenberger (2010) at 135.

return of a negative blue slip.¹⁴ Although Chairman Biden said that Cranston’s opposition would “affect Walker negatively,” the Committee held a hearing and reported Walker to the Senate, where he was confirmed.

1995 – June 5, 2001 | Chairman Orrin Hatch



Committee could consider nominees with a negative or unreturned blue slip

At the start of his chairmanship in 1995, Senator Hatch sent a letter to White House Counsel Abner Mikva stating that he would follow the policy articulated by Chairman Biden in 1989 that did not preclude review of nominees with negative blue slips unless the Administration did not consult with home-state senators.¹⁵ In 1997, Chairman Hatch sent another letter to the White House that reaffirmed this policy and articulated in more detail what meaningful consultation should look like.¹⁶

June 5, 2001 – 2003 | Chairman Patrick Leahy



Allowed a negative or unreturned blue slip to block a nominee

Senator Patrick Leahy became Chairman in June of 2001 after Democrats took control of the chamber. He sent a letter to White House Counsel Alberto Gonzalez essentially endorsing Chairman Hatch’s 1997 blue slip policy statement.¹⁷ But Chairman Leahy made statements to the press indicating he would move forward only when he received two positive blue slips from home-state senators.¹⁸ During the 107th Congress, seven nominees (five circuit court and two district court nominees) did not receive hearings because of blue slip issues.¹⁹ In fact, Chairman Leahy went even further and stopped Committee action with respect to two Sixth Circuit nominees for seats in Ohio because the Democratic senators from Michigan objected.²⁰

2003 – 2005 | Chairman Orrin Hatch



Committee could consider nominees with a negative or unreturned blue slip

The Republicans again took control of the Senate after the 2002 elections, and Senator Hatch again became Chairman of the Judiciary Committee. Chairman Hatch reiterated that “a single negative blue slip from a nominee’s home state won’t be enough to block a confirmation hearing.”²¹ He said he would give “great weight to negative blue slips” but would not allow senators to hold up “circuit nominees.”²²

¹⁴ *Id.*

¹⁵ Sollenberger (2003) at 15-16.

¹⁶ *Id.* at 15.

¹⁷ *Id.* at 19-20.

¹⁸ *Id.* at 20.

¹⁹ Sollenberger (2010) at 142-43.

²⁰ *Id.* at 143.

²¹ Sollenberger (2003) at 21.

²² *Id.*

Chairman Hatch held hearings and votes on five of the six circuit court nominees who had blue slip issues.²³ For example, Chairman Hatch held a confirmation hearing for Sixth Circuit nominee Henry W. Saad despite negative blue slips from Michigan Senators Levin and Stabenow. The Committee voted to send Saad to the Senate floor, where the Democrats successfully filibustered him as well as each of the other nominees. At the same time, Chairman Hatch did not move on any district court nominees with blue slip issues.²⁴

2005 – 2007 Chairman Arlen Specter	
n/a	Unclear whether a specific blue slip policy was established

Senator Hatch stepped down as Chairman of the Judiciary Committee at the beginning of the 109th Congress due to term limits. Senator Arlen Specter became Chairman. It is not clear what Chairman Specter’s policy was with respect to blue slips or if he even had a stated policy. At least one reputable secondary source indicates that, under Chairman Specter, a “[n]egative blue slip killed a nomination for district court judges, but not necessarily for circuit court judges.”²⁵

2007 – 2015 Chairman Patrick Leahy	
	Allowed a negative or unreturned blue slip to block a nominee

Senator Leahy again became Chairman of the Senate Judiciary Committee in 2007. He announced that he was reinstating his policy that he would proceed on a nominee only when both home-state senators returned positive blue slips.²⁶ During the 110th Congress, Chairman Leahy did not proceed on sixteen of President Bush’s nominees (six circuit court and ten district court nominees) who did not have the support of both home-state senators.²⁷

Chairman Leahy continued this policy throughout his chairmanship. In 2011, he explained that his blue slip policy was meant to encourage consultation between the White House and home-state senators.²⁸ But he also warned that he expected senators not to abuse the policy to delay filling vacancies. When the Republicans were in the minority from 2009–2014, Republican senators returned blue slips for 25 circuit court nominees, withheld a blue slip for one nominee (for lack of consultation), and rescinded positive blue slips for one nominee after his hearing (this seat was ultimately filled by another nominee of President Obama).²⁹ (By contrast, Democratic senators have withheld blue slips for three circuit court nominees in the first ten months of the Trump Administration.) The Republicans’ restrained use of the blue slip to block nominees meant that there was no need for Chairman Leahy to deviate from his strict blue slip policy. It is unclear what Chairman Leahy would have done had the Republicans abused the blue slip process for President Obama’s judicial nominees under Leahy’s chairmanship.

²³ Sollenberger (2010) at 144.

²⁴ *Id.* at 145-46.

²⁵ The Ohio State University Department of Political Science, *Blue Slip Senate Archive: Chair Policy*, available at <https://blueslips.osu.edu/policy.php> (last accessed Oct. 16, 2017).

²⁶ Sollenberger (2010) at 149.

²⁷ *Id.* at 150.

²⁸ Statement of Sen. Patrick Leahy, Mar. 16, 2011, *Confirmation Hearings on Federal Appointments, Senate Committee on the Judiciary*, 112th Cong., 1st sess., S. Hrg. 112-72, Pt. 1, at 1411.

²⁹ Compiled from public records of the Judiciary Committee.

Blue Slips and the End of the Filibuster

Since 1949, the Senate rules required a supermajority of the Senate to end debate for lower court nominations. This longstanding rule was the primary tool for senators in the minority party opposite the president to block nominees. Under this rule, senators who intended to oppose a nominee could return a positive blue slip in Committee and then filibuster the nominee on the Senate floor. For example, during the Bush Administration, Senator Feinstein returned a blue slip for Carolyn Kuhl, who was later reported out of the Committee. Feinstein and other Democrats then filibustered Kuhl's nomination on the Senate floor, preventing confirmation. In instances in which the Committee reported nominees with negative or unreturned blue slips, those nominees could still be filibustered by the full Senate. For example, in 2003-2004, the Democratic caucus, which was in the minority at the time, filibustered several of George W. Bush's nominees for federal court seats in Michigan for whom Senators Levin and Stabenow had returned negative blue slips.³⁰ This practice helps explain why few nominees with blue slip issues have been confirmed by the full Senate.

However, in 2013, Senate Democrats, then in the majority, unilaterally abolished the rule, ending the ability of a minority of senators to block confirmation of a lower court nominee. The Democrats argued that a minority of senators should not be empowered to block nominees who earned majority support after the committee has reviewed a nominee's background and qualifications. One of the leading proponents of abolishing the filibuster, Senator Jeff Merkley of Oregon, defended the move by saying:

*"Advice and consent" was never envisioned as a check that involved a minority of the Senate being able to block a presidential [nomination].*³¹

A blue slip policy allowing a single senator to block a nominee from even receiving Committee consideration is a more extreme example of a counter-majoritarian practice.

By eliminating the filibuster rule, the Democrats removed a tool for the minority to block nominees with negative or unreturned blue slips *after* the committee has evaluated nominees' qualifications. They are now, because of their own actions, in the position of having to rely on an ahistorical interpretation of the blue slip courtesy at the Committee level to attempt to defeat nominees they oppose on ideological or political grounds *before* the full Committee reviews a nominee.

³⁰ *Id.* at 145.

³¹ Amanda Terkel & Ryan Grim, *Jeff Merkley Isn't Letting Democratic Losses Stop His Fight For Filibuster Reform*, The Huffington Post (Nov. 24, 2014), available at http://www.huffingtonpost.com/2014/11/24/jeff-merkley-filibuster_n_6213740.html.