

The Politics of Judicial Selection and Early Use of the Blue Slip

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**The George Washington University
Rice University Undergraduate Research Conference**

Abstract

Today, the process of selecting judges has become rather controversial. With the Democrats and Republicans trying their best to inhibit each others judges from being confirmed, one simply has to wonder what political tool is used to hold up judicial confirmation. The blue slip, as it literally appears, is the infamous tool senators have used throughout the twentieth century to provide their opinion on the presidents' judicial nominations. The two United States Senators, who are from the state of the judicial nominee, are given the right to provide their advice on behalf of the nominee by responding positively, adversely, or not at all on a blue slip. The Senate Judiciary Committee then reviews the blue slips submitted by the two U.S. senators and votes on whether or not to send the nomination before the entire Senate for a floor vote. In this paper, I examined the earlier half of the twentieth century, analyzing the 63rd Congress to the 77th Congress (1913-1941), looking at how much power the blue slip had over earlier judicial nominations to the District Courts and Courts of Appeal. Although today's process is very similar to the time period studied, there are differences in how much influence the blue slip had on the nominees' fate. In the last part of the twentieth century, it has become the norm that a negative blue slip would withhold a nominee from advancing to a Senate floor vote. However, one must take a look into the earlier blue slip trends to see if this was always characteristic of the politics of judicial selection.

Judicial selection is the process in which the president nominates a candidate for a federal judgeship, and the Senate either confirms or fails to confirm the nominee. The Constitution guarantees these rights in Article 2, Section 2: "The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...judges of the Supreme Court, and all other Officers of the United States." The senators' right to give advice and consent is extremely pertinent in the judicial nomination process. In

particular, a piece of paper has played a vital role in the nomination of federal judges. The blue slip is literally a blue slip of paper that is given to each of the two home state senators for the pending nominee. The senators provide advice about the nominee, which is utilized by the Senate Judiciary Committee and the Senate body in considering whether to confirm the nominee for a judgeship. The senators respond either adversely, favorably, or fail to return the blue slip back to the Senate Judiciary Committee. According to contemporary practice in the Senate, the blue slip strongly shapes the nominees' fate.

In this paper, I address the question: How much influence did the blue slip originally have over the fate of judicial nominees? This question is important, because it sheds light on the amount of power senators wield in selecting judges and the degree to which the senators' advice influences judicial selection. Through my research at the National Archives reviewing lower federal court appointments to the District Courts and Courts of Appeal from the 63rd Congress to the 77th Congress (1913-1941), I have explored the initial use of the blue slip in the Senate. The historical record provides profound insight into the politics of judicial selection, affording scholars a better understanding of the forces affecting the fate of judicial nominees.

Data and Methods

To study the impact of the blue slip and how it has changed over time, I examined Senate records in the National Archives from Congresses in the early twentieth century. I first constructed a database by using the Federal Judicial Center's records of all judges that were confirmed between 1913 and 1941. I then used the Executive Dockets of the

Senate Judiciary Committee to identify all judicial nominees who were not confirmed. I recorded a total of 462 nominations to the District Courts and Courts of Appeal. For each nominee, I recorded the date on which the blue slip was sent to each home state senator, the date of their replies, and the fate of the nominee (the data are summarized in table 1).

The Senate Judiciary Committee Executive Dockets contain the listings of all executive nominations for federal positions from the 39th Congress up to the 82nd Congress. The information recorded in the dockets varies overtime. For example, before the 63rd Congress, 1913-1915, the docket books are not very detailed. They list the date the nominee was referred to the Judiciary Committee and the date the nominee was confirmed or not confirmed. Thus, I begin my analysis with the 63rd Congress (1913-1915). The reason for the lack of information on federal nominations, as detailed in the Executive Dockets, most likely resulted from the different styles of the Senate Clerks and the recognition that, as time progressed, there was much more careful attention to filing and recording information on nominees. It is also possible that senatorial consultation did not occur regularly until 1913 when a new Democratic Chair, Charles Culberson, took reign of the committee.

The 63rd Congress (1913-1915) appears to have been a turning point in the history of judicial selection. During this Congress, the first blue slips are recorded with written recommendations from the home state senators. However, this was not the first time the committee solicited the views of home state senators. According to the Senate Judiciary Committee Executive Dockets, some form of senatorial consultation over

judges occurred very episodically back to the 47th Congress (1881-1883).¹ From the 47th Congress to the 63rd Congress, there was an occasional mention of soliciting senators' views; however, there was no written response designating how the home state senators responded to the inquiry.

Beginning in the 63rd Congress docket book, the committee recorded the date an inquiry was addressed to each senator from the nominee's state, the date the papers and information was requested of the Attorney General, the date of the Attorney General's reply, the date the committee reported favorably or adversely, the date of confirmation or rejection, and the dates and responses from the home state senators. These data allow me to examine the early use of the blue slip and its impact on the presidents' judicial nominees (see summary in Table 2).

Impact of the Blue Slip

The 63rd Congress was an optimistic time period for judicial nominees. All of the 27 judicial nominees in this Congress were confirmed, and there were two cases in which the nomination was received and confirmed by the Senate Judiciary Committee on the same evening as stated from the 63rd Congress' Executive Docket. There were no instances of nominees receiving negative blue slips. All of the nominees had favorable blue slips with either one or two senators responding. If only one senator responded, it was assumed that the other senator did not object to the confirmation as written on the blue slip. There were six times in the 63rd Congress with nominees having only one senator respond. However, most of the nominees had both senators responding. For

¹ Reference to senatorial consultation for non-judicial nominations appears episodically starting in the 39th Congress.

example, the nomination of Maurice T. Dooling of California to the northern district of California contained both blue slips from the state senators. The first blue slip, dated July 21, 1913, from Senator Works stated: “Senator Works replies to the inquiry of the Committee that he approves the appointment.”² The second blue slip from Senator Perkins on July 21, 1913 stated: “Senator Perkins says is a most excellent appointment – that Judge Dooling has been on the bench in California for many years, and enjoys an enviable reputation.”³ Seven days later, on July 28, 1913, Maurice Dooling was confirmed.

The blue slip, as seen in the 63rd Congress, had tremendous power in securing confirmation of federal judges, meaning favorable blue slips led to successful nominations. The question then arises: What happens when a judicial nominee receives a negative blue slip? The 64th Congress (1915-1917) had one nominee who was not confirmed but had received favorable blue slips from the state senators. David Westenhaver, according to the Executive Docket, was not confirmed due to Senate recess but was later confirmed in the 65th Congress.⁴ Nominations such as Westenhaver’s became commonplace in the later Congresses, with the Senate delaying confirmation due to recess and adjournment.

The 65th Congress (1917-1918) was the first Congress to have recorded negative blue slips and unsuccessful confirmations. There were a total of four unsuccessful nominations in this Congress. For example, William Kyser was nominated to the United States District Court for the Western district of Tennessee. The inquiries were sent to the

² *Committee on Judiciary Docket*. 63rd and 64th Cong., 1st sess., 21 July 1913, 38.

³ *Committee on Judiciary Docket*. 63rd and 64th Cong., 1st sess., 21 July 1913, 38.

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senators on March 14, 1917. One day later Senator Shields (D-TN) responded saying, “The nomination of Kyser was made over my protest and is personally offensive and obnoxious to me, and I most strongly oppose his confirmation.”⁵ On the same day, Senator McKellan (D-TN) responded with a favorable recommendation. Despite receiving a favorable blue slip, Kyser was “killed” at the committee stage, never making it to a floor vote. From this, one can conclude that the negative blue slip had more sway than a favorable blue slip and was even powerful enough to halt a nominee from proceeding in the confirmation process. Also, it is important to note that both senators were of the same party origin as President Wilson, and the nominee was still not confirmed.

Not all negative blue slips, however, were sufficient to block a nominee from proceeding to a floor consideration by the Senate. For example, two of the nominees in the 65th Congress received negative blue slips from both senators but still proceeded to a floor vote. The first nominee was W.E. Thomas, nominated to the United States District Court for the Southern District of Georgia, who received a blue slip from Senator Smith on July 12, 1917 stating “I am opposed to confirmation,” and then another one from Senator Hardwick also stating “I am opposed to confirmation.”⁶ Despite these objections, Thomas still proceeded to a floor vote in which his nomination was defeated.

To determine the fate of Thomas and other nominees, I used the Senate Executive Session Journal, which records floor action for each nominee. U.V. Whipple’s report appeared in the Executive Session Journal as:

⁵ *Committee on Judiciary Docket*. 65th Cong., 1st sess., 15 March 1917.

⁶ *Committee on Judiciary Docket*. 65th Cong., 1st sess., 14 March 1917.

Mr. Smith of Georgia, from the Committee on the Judiciary, to which as been referred the nomination of U.V. Whipple to be United States district judge for the southern district of Georgia, reported adversely thereon.

On motion by the same Senator, and by unanimous consent, The senate proceeded to consider the said nomination, and it was *Resolved*, That the Senate do not advise and consent to the appointment of the said person to the office named.⁷

U.V. Whipple, like Thomas, received two negative blue slips stating opposition to his nomination. Senator Hardwick stated “I object to this appointment – the nominee is personally offensive and objectionable to one, and I cannot consent to the confirmation of the nominee.”⁸ Both nominees were considered by the floor, even though they received negative blue slips in committee.

The last nominee who failed to be confirmed in the 65th Congress was Thomas Haight. Haight, appointed to the United States Court of Appeals for the Third Circuit, received two favorable blue slips but was not confirmed due to Senate recess. This nomination was similar to David Westenhaver’s in that he was not confirmed in the 65th Congress but was confirmed in the 66th Congress. One can conclude from the above nominations that negative blue slips usually did not kill a nominee in the committee stage. This is contrary to contemporary practice in which a negative blue slip is deemed sufficient to block committee action. Instead, the early blue slips appear to have led the full Senate to reject the nominee.

This mold does not fit however for one of the later Congresses. The 66th, 67th, and 68th Congresses, unlike the 65th Congress, had no unsuccessful nominations. All of the nominees received either two favorable blue slips, one favorable blue slip or no blue

⁷ *Executive Journal*. 65th Cong., 1st sess., 24 April 1917.

slips from the state senators and were shortly afterward confirmed. It was not until the 69th Congress, 1925-1927, that the trend of unsuccessful nominations began again.

Wallace McCamant was nominated for the United States Court of Appeals for the 9th Circuit. Senator McNary responded on December 8, 1925, “Well qualified and is President Coolidge’s selection.”⁹ Senator Stanfield responded on the same day:

Judge Wallace McCamant of Oregon is a high-grade man, thoroughly qualified by education and experience on bench and at bar in every way to fill, with credit, the office to which the President has appointed him. The political difference between Senator Johnson and Judge McCamant is fully explained in the brief and affidavits filed with your Committee in behalf of Judge McCamant. I am pleased to urge his confirmation.¹⁰

Despite favorable recognition from the senators, the nominee was killed in a floor vote on March 17, 1926. The death of McCamant’s nomination was attributed to a violation of Oregon Law. The explanation for his denial was explained in some of the memos in his nomination file.

The memorandum, *In the Matter of the Refusal of Wallace McCamant to Vote For Hiram Johnson for President in 1920*, gave some insight on why McCamant was not confirmed. McCamant, as a delegate at the Republican National Convention in 1920 from the state of Oregon, voted on each of the ten ballots for the nomination of General Leonard Wood for president. As a result, Senator Hiram Johnson put forth two charges against McCamant. First, “that he violated the law of Oregon and second, that he broke faith with the Republican electors of Oregon.” McCamant’s unscrupulous actions created

⁹ *Committee on Judiciary Docket*. 69th Cong., 1st sess., 8 December 1925.

¹⁰ *Committee on Judiciary Docket*. 69th Cong., 1st sess., 8 December 1925.

a storm of protest from angry Californians and Oregonians. For example, one protester sent the Judiciary Committee a telegram stating:

As a lawyer practicing almost exclusively in the Federal Courts and for eighteen years in California but not upon any personal or fitness grounds I do protest against appointment of Judge McCamant to our circuit court of appeals on obvious ground that it leaves California with biggest population in ninth circuit without representation on that bench and gives Oregon double representation stop strongly urge that no appointment be Made other than of California man as we have many splendid jurists Eligible such as Judge James of District Court Los Angeles.¹⁰
-Raymond Ives Blakeslee

This was the only nomination in which the nominee received two favorable blue slips but was not successfully confirmed. This unsuccessful nomination deviates from the treatment of all other nominees in the early 20th century period studied. Many nominations were controversial in this period, but any nomination with two favorable blue slips was still confirmed. It was most likely McCamant's violation of the law that contributed to his failure. McCamant was not re-nominated in later Congresses, and represents an anomaly in the politics of judicial selection in this period.

The second unsuccessful nomination in the 69th Congress was that of William Tilson. Tilson was nominated to the United States District Court to the Middle District of Georgia. On June 10, 1926, Mr. Walsh on the Senate Judiciary Committee reported adversely. Eight days later Tilson's nomination was withdrawn and never appeared again in succeeding Congresses. One can conclude that the full Senate, after the Committee reported adversely, made the final decision not to confirm Tilson.

¹⁰ *Nomination File*. 69th Cong., 1st sess.

The 70th Congress (1927-1929) was the most dismal out of the fourteen Congresses in terms of number of failed nominations. It is also a Congress in which the blue slip appears to have had significant influence over the fate of these nominees. The 70th Congress appears to mark a total of ten unsuccessful nominations. Of these, eight were killed at the committee stage and two were withdrawn. Each of the nominees had at least one senator responding adversely toward the nominee. One can conclude that a negative blue slip outweighed a favorable blue slip, indeed killing a nominee at the committee stage.

The 70th Congress thus marked a significant change in the history of judicial selection. Before this Congress, there were few nominees that were killed by negative blue slips in the committee stage. Most were disposed of on the Senate floor. The 70th Congress set a trend that would be repeated in subsequent Congresses. Still, the 71st, 72nd, and 73rd Congresses marked a decline in the number of failed nominations. The unconfirmed nominations from these Congresses were due to Senate adjournment, with one of the nominees being confirmed in a later Congress and two others never coming up again.

Starting in the middle of the 74th Congress (1935-1937), the Senate Judiciary Committee Executive Dockets contained no reference to blue slips. In order to determine whether or not the nominees received blue slips and if they had any effects on the nominees' fate, I examined the Senate Nomination Files, which contain a portfolio for each nominee typically consisting of blue slips, news articles on the nomination, and letters from constituents and government officials. The 74th Congress had all of its

nominees confirmed with all favorable blue slips or in some cases no blue slips, which meant that the senator did not object to the nomination. The 75th, 76th, and 77th Congresses were all very similar to the 74th Congress in not having any recordings of blue slips in the Executive Dockets. For these Congresses, I also sought out the expansive Nomination Files to analyze the effects of the blue slip on nominees.

The 75th Congress, 1937-1939, contained interesting records on the nominees. Many of these nominees did not contain blue slips in the Senate Nomination Files. One possible explanation for the absence of the blue slips in the Executive dockets was poor record keeping. Perhaps the blue slips were returned by the senators and were not properly filed away in the records. Another possibility was that the senators did not return the blue slips to the Senate Judiciary Committee. It will always be an enigma as to why the blue slips seemed to not appear in the 75th, 76th, and 77th Congresses and whether it might be attributable to poor record keeping or failure on behalf of the senators to return their blue slips. It was interesting that the few nominees that had a record of blue slips in the Senate Nomination Files were all similar in that they did not have a record of public opposition toward their nomination. In contrast, the nominee files without blue slips contained letters of opposition from the public and government officials. Again, if both senators did not return blue slips, it was assumed by the Judiciary Committee that the senators did not object to confirmation. One has to wonder whether the senators did not return the blue slips for controversial nominees for a reason, perhaps so it would look as though they were more neutral toward the nominee, allowing the judicial process to confirm the nominees.

What happens when constituents from the nominee's home state object to the nomination? Do they have any power over the nominees' fate? Contention over the nomination of Harold P. Burke sheds some light on these questions.

Harry F. Ashurst, Chairman of the Senate Judiciary Committee, wrote to Senator Royal Copeland of New York: "Please be assured that Mr. Moser's letter will be laid before the Senate Committee on the Judiciary for their consideration."¹¹ Clarence P. Moser, an attorney from Rochester, New York, wrote a letter to Senator Copeland expressing his discontent over Harold P. Burke's nomination. The letter appeared in the Nomination File for the 75th Congress on May 22, 1937 as:

My Dear Senator Copeland:

I have read in the public press that the President has designated Harold P. Burke as United States District Judge for the Western District of New York to fill a vacancy which has existed since the first of January, when Judge Rippey resigned to take his place in the Court of Appeals. The newspapers also state that there has been some objection to his confirmation by the Senate, and that the Committee to which it was referred will hold a hearing.

My only interest in the appointment is that I practice law before the United States District Court and I am concerned about the qualifications of the man who will become Judge of that Court. Lawyers are the only ones who take an interest in judicial appointments, because they know the qualifications of a Judge, and they and their clients are the ones who suffer if the appointee is not qualified.

I think I may safely say that the appointment of Harold P. Burke is not satisfactory to the lawyers of this community. Neither is it satisfactory to the rank and file of the Democratic Party, or even the prominent Democrats in this community...I think that Mr. Burke's appointment pleases no one except his own personal friends, and the only reason there has not been a storm of protest from the practicing lawyers is because no lawyer wishes to be singled out as opposing the appointment of the Judge before whom he will have to practice.¹² – From Clarence P. Moser, Atty. at Law, 45 Exchange St., Rochester, New York

¹¹ *Senate Nomination File*. SEN 75B – A4., 22 May 1937.

¹² *Senate Nomination File*. SEN 75B – A4., 22 May 1937.

The nomination of Harold P. Burke was one in which the local constituents disapproved of the nominee, who as one constituent put it “please[d] no one except his own personal friends.”¹³ One has to contemplate why Burke was confirmed with only one senator responding favorably, especially with all of the public opposition of which Clarence P. Moser was only one out of many.

Senator Robert Wagner (D-NY) was the only senator recorded in the Executive Docket to respond favorably for Burke’s nomination. There was no record of the other New York senator’s name or response in the Executive Docket. By using an outside source, I was able to find out that the other senator was Royal Copeland (D-NY). * It is possible to conclude from this nomination that Senator Wagner, being from the same party as President Franklin D. Roosevelt, was supportive of the nomination for partisan reasons. As for Senator Copeland, one can only speculate as to whether or not he was supportive of the nomination. Knowing that Senator Copeland was from the president’s party, I anticipate that he was supportive of the nomination but his record of support failed to be recorded with the other senators’ responses in the Executive Dockets and the Nomination Files.

The 76th Congress, 1939-1941, also had public discontent with the president’s judicial nominees. For example, Congressman Dies from Texas expressed his opposition in the Senate Judiciary Committee Hearing on the nomination of James V. Allred. Congressman Dies testified in the Committee hearing for James V. Allred on January, 27, 1939. Dies opposed Allred’s nomination because he was a non-resident.

¹³ *Senate Nomination Files*. SEN 75B – A4.

* Information obtained from the website: voteview.uh.edu. This website does not include senators’ responses

Dies stated: “I don’t think the people of that district want any non-resident to have this judgeship. They have a great many lawyers in Texas and in that judicial district who are qualified for this position. I feel personally that the sentiment is overwhelmingly against the appointment of Governor Allred or anyone else who resides outside of that district.”¹⁴

Despite the Congressman’s opposition, Allred was successfully confirmed. It was interesting that Allred was still confirmed despite opposition from the Congressman and constituents from the Southern district of Texas. Allred, like many of the nominations in the 75th, 76th, and 77th Congresses, did not have any record of blue slips being returned by the senators. Allred, along with the nominees from the other Congresses, were confirmed despite outright public opposition.

Discussion

Contemporary scholars date the blue slips’ origin sometime between 1917 and 1954. This has been established by a memorandum prepared by the Judiciary Committee staff in 1979, which stated that the blue slip procedure had been around for over twenty-five years.¹⁵ Clearly, from the Executive Dockets, however, the blue slip was in use as early as 1913. The policy, according to the wording on the blue slip, was that failure to return a blue slip within the allotted time meant the home state senators did not object to the nomination.¹⁶ Failure to return a blue slip in the later twentieth century, however, came to represent an objection by the state senator in reference to the nominee’s position for a particular judgeship. Senator Edward Kennedy tried to change the “negativity” that the blue slip had come to confer by stating that he would not “unilaterally table a

¹⁴ *Senate Nomination File*. 76th Cong., 1st sess., 27 January 1939.

¹⁵ Brannon P. Denning, 2.

¹⁶ *Senate Nomination File*. 63rd Cong., 1st sess., 1913.

nomination simply because a blue slip is not returned by a colleague.”¹⁷ To justify for a nominee that did not have blue slips, Senator Kennedy decided to make sure that the nominee was not killed outright without the committee first voting on whether or not to proceed with the nomination.

Raymon L. Solomon in his article, “The Politics of Appointment and the Federal Courts’ Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.,” portrayed the blue slip procedure as the key component that decided whether or not a nominee moved on from the committee stage. He described a withheld blue slip as the tool to prevent a nomination from proceeding forth from the Judiciary Committee: “A nomination is not reported favorably out of committee unless the senior senator of the president’s party from the nominee’s home state has signed and returned the blue slip, indicating he has no objection to the nomination.”¹⁸ Solomon’s depiction was correct for today’s blue slip procedure, despite the recent exception in a case involving several 6th Circuit Court of Appeals in which the nominees are moving forward from the committee despite unfavorable blue slips.¹⁹ Solomon’s depiction, however, does not fit the use of the blue slip in the early twentieth century. The blue slips did not have to be returned to the Judiciary Committee and signed with approval by the senators in order for the nominee to move to a Senate floor vote. This is clear in the treatment of the 65th Congress’ nominees, W.E. Thomas and U.V. Whipple, who both received unfavorable blue slip but were still moved forward from the committee to a floor vote, where they were defeated.

¹⁷ Brannon P. Denning, 2.

¹⁸ Rayman L. Solomon, “The Politics of Appointment and the Federal Courts’ Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.,” *ABF Research Journal* 2 (1984): 291.

¹⁹ Jennifer A. Dlouhy, “Senate Traditions a Casualty in Judicial Nominees Spat,” *Congressional Quarterly Weekly*, 12 July 2003, 1737.

Failure to return a blue slip in the past did not kill a nominee but allowed the nominee to move swiftly from the Judiciary Committee to the Senate floor. This is supported by my research on the fourteen Congresses in which I found some nominees who received only one blue slip and were still confirmed.

While poor record keeping might be a plausible explanation for some of the nominees' files without blue slips, I am assuming that it was not characteristic for all of the nominees without blue slips in the Dockets and Nomination Files. A senator might decide against returning the blue slip because it meant the same as if he did return it with a favorable recommendation. The difference between a returned blue slip and a withheld blue slip is that the latter was much simpler and did not take any time. Perhaps blue slips were not returned because the nominee was extremely controversial with both opposition and support from the public, and the senator did not want to get entangled in the fray.

Today, failure to return a blue slip is typically enough to keep a nominee from being confirmed. Sometime in the mid to late twentieth century, the blue slip procedure thus changed to instead reflect its lack of opposition. Failure to return a blue slip came to serve as a means of killing a nominee in committee. This trend may be changing, however, as seen with the Michigan nominees to the 6th Circuit Court of Appeals. The Michigan case reflects the trends of the past in the politics of judicial selection and an anomaly for the recent trend in the judicial selection process.

On July 30, 2003, in a Judicial Nomination Hearing, Senator Patrick Leahy eloquently described the power of the blue slip in confirming judges. He said,

Today is the first time that our Chairman will ever have convened a hearing for a judicial nominee with two negative blue slips returned to

the Committee- the first time ever. I believe it may be the first time any Chairman and any Senate Judiciary Committee proceeded with a hearing On a judicial nominee over the objection of both home-state Senators. It Is certainly the only time in the last 50 years, and I know it to be the

Only time during my 29 years in the senate.²⁰

From this, one can conclude that the blue slip, at least in the past fifty years, has had enough influence to keep a nominee from proceeding forth from the Judiciary Committee. The Michigan case is not unprecedented in Senate history, however, as evidence from the early use of the blue slip suggests. This current anomaly was more commonly seen in the politics of past judicial selection.

Changing Blue Slip Trends

In a Congressional Quarterly article “Senate Traditions a Casualty in Judicial Nominees Spat,” Jennifer Dlouhy mentioned the changing blue slip trends. She said, “When Clinton would send up somebody, and a home-state senator didn’t return a blue slip, they just would stop them altogether.”²¹ This new trend has made the blue slip appear as “killer” device used by both parties to hold up judicial nominees. Dlouhy emphasized the dangers of such changing trends by saying, “When both Republicans and Democrats are willing to take advantage of all their tools – formal and informal – and traditions and customs to advance their views, they end up bending rules and dispensing with Senate customs.”²² In other words, the Republicans and Democrats are willing to break former blue slip procedures in order to benefit their own parties and fetter the

²⁰ *United States Senate Committee on the Judiciary*. 108th Cong., 2nd sess., 30 July 2003, 1.

²¹ Jennifer A. Dlouhy, “Senate Traditions a Casualty in Judicial Nominees Spat,” *Congressional Quarterly Weekly*, 12 July 2003, 1737.

²² Jennifer A. Dlouhy, “Senate Traditions a Casualty in Judicial Nominees Spat,” *Congressional Quarterly Weekly*, 12 July 2003, 1737.

opposing party from proceeding with its judicial nominations. As Dlouhy explained, “When Democrats decided to filibuster nominees to the U.S. Court of Appeals this year, they did away with a longstanding gentlemen’s agreement in the Senate.”²³ The Republicans are also breaking from the past fifty years of judicial selection by proceeding with the confirmation process on the four nominees to the Sixth Circuit Court of Appeals despite negative blue slips from Michigan Democratic Senators’, Carl Levin and Debbie Stabenow.²⁴

Some of the concerns raised by this game of “political football,” were aired in a Senate Judiciary Committee hearing on January 29, 2003. The committee met on that day to discuss three nominations: Deborah Cook, to be U.S. Court of Appeals Judge for the Sixth Circuit, John Roberts, to be U.S. Court of Appeals Judge for the D.C. Circuit, and Jeffrey S. Sutton, to be U.S. Court of Appeals Judge for the Sixth Circuit. The committee discussed the nominations, which were noted by one senator on the committee as “controversial.” Senator Schumer of New York stated before the Chairman and the Committee:

I guess the point I want to make is having three substantial, controversial nominees to the court, to the important Courts of Appeals is brand new. The notice, as I say, has not been thorough, and we do not even have committee rules yet. We have not discussed what is happening with the “blue slip.” We have not discussed any of the other kinds of rules that this committee has always prided itself on having, and then, to boot, today there were so few questions asked by people on the minority side, it almost seemed like a rush to judgment. The White House says put them in, get them done as fast as you can, as few questions as possible, and we will just move them, and I worry about that. I worry about it from a constitutional perspective because there should be a real advise and

²³Jennifer A. Dlouhy, “Senate Traditions a Casualty in Judicial Nominees Spat,” *Congressional Quarterly Weekly*, 12 July 2003, 1735.

²⁴Jennifer A. Dlouhy, “Senate Traditions a Casualty in Judicial Nominees Spat,” *Congressional Quarterly Weekly*, 12 July 2003, 1735.

and consent, whether you agree, whether you are the same party or the different party.²⁵

Senator Schumer spoke of the need for the Senate to uphold the Constitution's right of allowing the senators to give advice and consent. It appears that both sides are playing politics to some extent and the blue slip seems to be in the middle of the game.

Chairman Hatch gave the Republican viewpoint at this committee hearing.

Senator Hatch emphasized the need for the judicial procedure to change. Change was necessary for the system to be fair and just to all nominees regardless of party affiliations. As to the four nominees from Michigan, Hatch said: "These qualified nominees are being held up for no reason other than that two Senators are irritated because they did not get their two judges during the Clinton years...I just want to correct the record so that we all understand that we are in a crisis here in the United States Senate."²⁶ Hatch used very powerful words, such as crisis, that inferred the judicial nomination procedure was in a quagmire that desperately needed to be corrected to ensure that both parties worked together in a democratic fashion.

I conclude from Senator's Hatch's statement that the United States Senate is in a state of crisis with the confirmation of federal judges to the District Courts and Courts of Appeal. The old adage of "what goes around comes around" is being played out between the Republicans and the Democrats. I suspect that the Democrats are angry that their nominees were upheld during Clinton's tenure after the Republicans gained control over the Senate in 1994. It makes sense that they would be angry over their delayed

²⁵ *Committee on the Judiciary Transcript of Proceedings on Judicial Nominations*. 108th Cong., 2nd sess., 29 January 2003, 146-147.

²⁶ *Committee on the Judiciary Transcript of Proceedings on Judicial Nominations*. 108th Cong., 2nd sess.

nominations. It also makes sense that the Republicans are presently upset with the Democrats attempting to uphold their nominees. One can conclude that both parties have manipulated the blue slip and its interpretation for partisan reasons.

Why have there been such changes in the use of the blue slip? After evaluating trends in judicial selection from the 63rd Congress to the 77th Congress, it is now possible to make inferences to explain the phenomena analyzed in these Congresses. For instance, the new committee chairman of the 70th Congress, George Norris (Rep.), might have decided to change the trends of judicial selection by allowing negative blue slips to halt a nominee in committee rather than following the past example of using the Senate floor to decide on a nominees' fate. This would help to explain the eight nominees who were killed at the committee stage during the 70th Congress. Divided party control between the executive and the Senate is another plausible explanation for unsuccessful nominations. This exists when home state senators are from a different party than the president. However, it is important to realize that though this might be indicative of one or possibly two of the failed nominations, it is not ubiquitous for all the failed nominations. For example, there were situations where the home state senators and the president were from the same party, but the home senators still rejected the presidents' nominees.* This may be explained by outside pressure such as the home state senators' constituents urging opposition to the nomination or for these Southern Democrats' policy differences with the new Democratic president Woodrow Wilson. Clearly, much work remains to explain

*In the 65th Congress (1917-1919), Senators' Smith and Hardwick of Georgia were of the same party as President Wilson (Democrat) and objected to Wilson's nomination of W.E. Thomas by submitting negative blue slips.

why the committee created the blue slip in 1913 and why its impact on the fate of nominees has changed over time.

Conclusion

The blue slip has come a long way since its first formal appearance in the 63rd Congress (1913-1915). The blue slip, although first formally recognized in 1913, may have extended all the way back to the late nineteenth century starting in the 43rd Congress. We are left skeptical to just how much influence the blue slip had on the fate of judicial nominees from the 43rd Congress to the 62nd Congress because there is no reference of the state senators' responses to the judicial nominees, only occasional mention of soliciting the views of the senators.

From my research on the blue slip from the 63rd Congress to the 77th Congress, I conclude that the blue slip played a tremendously vital role in the fate of judicial nominations. I did not come across any instances in which a nominee received negative blue slips and was still confirmed. Most of the nominations that failed were killed either in the committee, as seen in the 70th Congress, or on the Senate floor, which differs from the most recent trend over the past fifty years in which negative blue slips have typically blocked nominees from moving forward from the committee . Only Wallace McCamant, in the 69th Congress, received two favorable blue slips and was still denied confirmation. This was most likely due to his violating the Oregon law's rules for delegates to the Republican National Convention in 1920.

The blue slip procedure has thus changed considerably since the early twentieth century. Instead of the blue slip being used as a tool for senators to expedite judicial

nominees, it has been exploited to delay nominations, often contributing to their defeat. Failure to return a blue slip no longer means that the senator does not object to the nomination but has come to serve as a delaying tactic often used by the party opposing the president.

In my opinion, the blue slip procedure seen in the past, in the early to mid twentieth century, represented the most democratic form of judicial selection. By allowing a nominee with two negative blue slips to proceed to a floor vote, the Senate Judiciary Committee was not giving the state senators complete autonomy but allowed other senators to give their advice and consent on the nomination. The Constitution does not state anywhere that advice and consent must come from only the two senators from the nominees' state. Although the state senators' advice should be given full accord, it should not be given the power to kill a nomination. It is almost guaranteed that the Senate floor will follow the views of the home state senators and the committee recommendation, but this does not mean that it always happens, as seen with the McCamant nomination. Perhaps, the past does repeat itself, and we are currently slipping back into the older blue slip procedure, allowing nominees with negative blue slips to move forward from the committee to a floor vote.

Our founding fathers set up a government based on the separation of powers and checks and balances. Both the executive and the legislative theoretically hold equal power in judicial selection, with the president holding the right to appoint and the Senate the right to give advice and consent. The question is and will continue to be: Just how much power should home state senators hold when confirming nominees? The only way

to answer this is by looking to the past. As John F. Kennedy once said, “A knowledge of the past prepares us for the crisis of the present and challenge of the future.”²⁸

Table 1. Fate of Judicial Nominations to the Lower Federal Courts, 1913-1943

<u>Congress</u>	<u>#Nominees considered</u>	<u>#Nominees confirmed</u>	<u>#Nominees failed</u>	<u>#Nominees killed in committee^b</u>
63 rd (1913-5)	27	27	0	0
64 th (1915-7)	16	15	1	0
65 th (1917-19)	23	18	4	1
66 th (1919-21)	14	14	0	0
67 th (1921-23)	49	49	0	0
68 th (1923-25)	26	26	0	0
69 th (1925-27)	20	18	2	0
70 th (1927-29)	43	33	10	8
71 st (1929-31)	47	45	2	0
72 nd (1931-33)	19	18	1	0
73 rd (1933-35)	20	19	1	0
74 th (1935-37)	27	27	0	0
75 th (1937-39)	39	39	0	0
76 th (1939-41)	60	58	2	1
77 th (1941-43)	32	32	0	0
<u>TOTAL (%)</u>	<u>462</u>	<u>439 (95%)</u>	<u>23 (4.98%)</u>	<u>10</u>

Source: Data compiled by author from the Senate Judiciary Committee Executive Dockets.

^aAll nominees had at least one negative blue slip

^bAll nominees had negative blue slips except the 69th Congress nominee who had two positive blue slips and was defeated on Senate floor

²⁸ John F. Kennedy's Inaugural Address, 1961.

Table 2. Pivotal Events in Early History of the Blue Slip

63 rd Congress, 1913 - 1915	First recorded instance of routine use and return of blue slip, All nominees were confirmed
65 th Congress, 1917 - 1919	First recorded negative blue slips / 4 nominees not confirmed: 1 killed in committee, 2 killed on Senate floor and 1 confirmed in the 66 th Congress.
66 th Congress, 1919 - 1921	All nominees were confirmed
67 th Congress, 1921 - 1923	All nominees were confirmed
68 th Congress, 1923 - 1925	All nominees were confirmed
69 th Congress, 1925 - 1927	Nominee not confirmed despite positive blue slips
70 th Congress, 1927 - 1929	First time a plethora of nominees are killed in committee / 8 nominees killed in committee
74 th , 75 th , and 77 th Congresses	All nominees were confirmed

