

FEDERAL JUDICIAL SELECTION AND THE SENATE'S BLUE SLIP "TRADITION"

BY PROF. TUAN SAMAHON

A large part of what makes the federal judiciary distinctive is the federal method of judicial selection employed to staff it. Article II of the U.S. Constitution grants to the president the power to nominate and appoint officers of the United States, but qualifies that authority by requiring the Senate's "advice and consent."¹ Thus, the Appointments Clause formally describes the president as the sole nominating officer. The framers thought that this method would promote political accountability by placing responsibility for the nomination on one president, answerable to the nation as a whole. The president's exercise of nominating power is constrained. The "silent operation" of the Senate's power to confirm means the president must moderate his ideal choice of nominee to a candidate that the Senate is willing to confirm.²

The tradition of the "blue slip" further complicates the president's confirmation calculus. Even a compromise candidate who satisfies a Senate majority may not suffice. Each home state senator asserts a unique stake in federal judicial nominations to his or her state. The Judiciary Committee acknowledges that interest with the "blue slip," an institutionalized form of senatorial courtesy that solicits the home state senator's input on the nominee.³

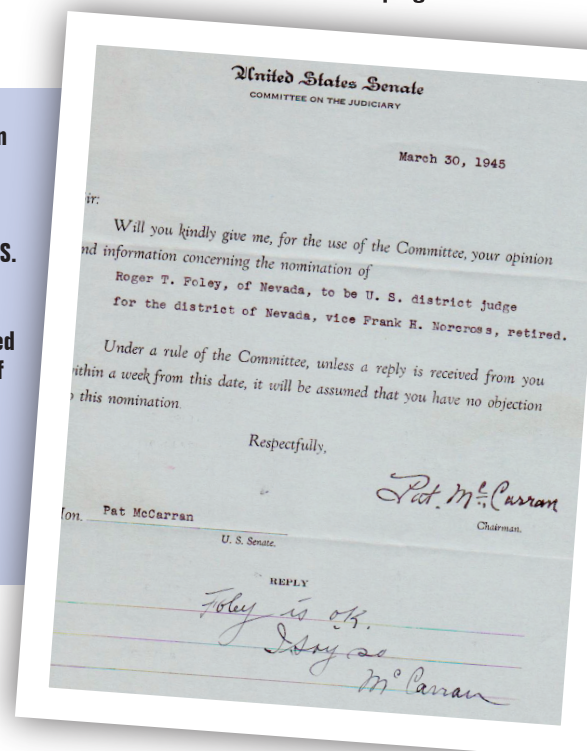
Consider the blue slip's operation in a recent nomination to the Nevada federal bench. In February 2012, President Barack Obama nominated Nevada District Judge Elissa

Cadish to become a U.S. District Judge. Judge Cadish's May 2008 response to a group's election questionnaire apparently aroused the opposition of Senator Dean Heller (R-NV).⁴ The senator returned a negative "blue slip" to Senate Judiciary Chairman Patrick Leahy (D-VT), who in turn exercised his discretionary prerogative as chair to enforce an interpretation of the blue slip that vetoed the nomination.⁵ In response, Senate Majority Leader Harry Reid (D-NV) promised to press confirmation, but doubted he would succeed given Chairman Leahy's adherence to "traditional" blue slip practice.⁶

What is "traditional," however, is disputable. The blue slip is noteworthy for its varied implementation. Each Judiciary Committee chair assigns different weights to senators' blue slips. At its weakest, the blue slip entails merely a presumption against action without pre-nomination

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Senator Pat McCarran (D-NV) returned a favorable blue slip on Roger Foley's nomination to be a U.S. District Court Judge in Nevada. As the Senator also happened to be the Chairman of the Senate Judiciary Committee, the blue slip was a note to himself. "Foley is OK. I say so. /s/ McCarran"



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consultation with at least one home-state senator.⁷ At its strongest, the blue slip assumes the status of a senatorial "veto" that requires *both* senators to concur.⁸ Failure to agree results in the nominee's defeat.

This strong version of the tradition, the "blue-slip-as-veto," ought to be abandoned as a matter of legal policy.

Historically, the "blue-slip-as-veto" approach lacks deep roots. In fact, the approach has prevailed during less than a third of the blue slip "tradition's" existence. When 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*.⁹ That strong reading reigned during his chairmanship (1956-78) but was abandoned promptly thereafter. Only since June 2001 and Senator Leahy's chairmanship over the Judiciary Committee has the Eastland view of the Senate's blue slip returned, and only episodically at that. By contrast, the weak version of the tradition – the approach that simply promotes pre-nomination presidential consultation with home state senators – has prevailed over two thirds of the time since the blue slip's 1917 debut. Given the lengthier pedigree of the tradition's weaker consultative form, it is unclear why the "blue-slip-as-veto" approach ought to be privileged as "traditional."

Is that "traditional" status merited by considerations of deference to a state and its senators in a federal system? The timing of the blue slip's rise belies any such claim. The blue slip arose in 1917, *after* senators no longer represented the interests of states as states and just prior to the 1918 election and the first entirely popularly elected Senate. Thus, the tradition is born at the same time that senators cease to represent states as states. Prior to the Seventeenth Amendment, a blue slip tradition might have made sense as a federalism-reinforcing tool. Senators were state ambassadors to a national union. They would have expressed the *démarche* of their state legislature, which had a particularly keen interest in the federal judicial adjudication of law within its jurisdiction. Following the amendment, it is unclear why senators should wield that power, except as a standing agreement between senators to enable their effective granting (and blocking) of patronage.

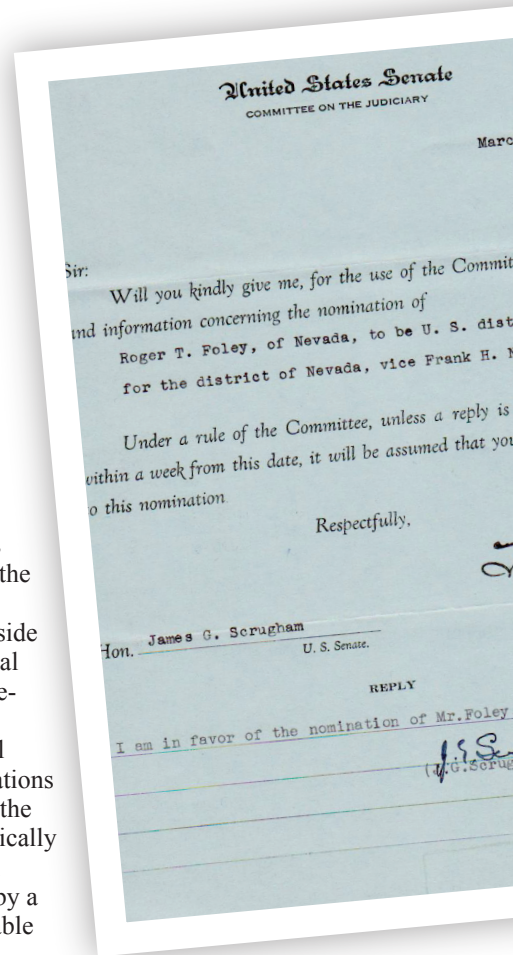
As a matter of constitutional policy, the "blue-slip-as-veto" approach wrests nominating power from the president and reassigns it to an individual senator. A senator may leverage a blue slip veto in confirmation into a power to nominate. A senator credibly threatens to veto each of a president's federal judicial nominees to that state unless the president accedes to the senator's choice of nominee. This bargaining in the shadow of a veto threat will assure home state senators effectively nominate the judges. Indeed, one U.S. senator described himself as having "nominated" a judge without even having consulted the White House.¹⁰ To be sure, a president could refuse to deal

and accept vacancies in that state. But barring that response, it is the senator's way or the highway under the blue-slip-as-veto.

At least two negative side effects result from senatorial nomination. First, the "blue-slip-as-veto" promotes parochialism on the federal bench. Presidential nominations subject to confirmation by the Senate as a whole are politically accountable to the national electorate; "nominations" by a single senator are accountable to only a segment of the country. Accordingly, these nominees may come to think, adjudicate and perhaps look like the common denominator of local constituencies and their principal interest groups. That outcome is desirable for a local majoritarian process, but runs in the opposite direction of many federal jurisdictional doctrines that intend federal courts to serve as distinctively national forums amenable to all. Federal question jurisdiction is premised on the desirability of a uniquely federal forum, willing and able to enforce federal rights for unpopular claimants. Federal diversity jurisdiction is predicated on the desirability of an available neutral federal forum for disputes between litigants from different states. Federal habeas corpus collateral review assumes the non-parity of federal and state courts.

Second, nomination by an individual senator entails ideological entrenchment among a judicial district's officers without the check of a national majoritarian political process. National constitutional rights, such as were at stake in desegregation, ought not to turn on whether a forum is located in a particular senatorial fiefdom. Rejection of the "blue-slip-as-veto" would mean a home-state senator loses the capacity to dictate judicial nominees for the state and entails a loss of ideologically entrenching power for the senator. There is, however, a silver lining for senators who agree to mutually surrender veto power: a neighboring state's senators also cannot "veto" nominees to shared collegial circuit courts. Unfortunately, most senators desire a veto and the accompanying nominating power, but want to deny their opponents the benefit of the same. Call it "veto for me, but not for thee." To such, it bears reminding that traditions adopted (or discarded) will bind a majority when it, eventually, becomes the minority.

No senator ought to be denied the right to cast a vote against a nomination. Such a vote against a nominee's confirmation is a constitutionally contemplated part of the



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Morcross, retired.

received from you
have no objection

Pat. M. Carran
Chairman.

Chairman
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federal appointments process. But that one senator ought to have the decisive say on appointments to the national judiciary is neither contemplated nor consistent with the policy of the Constitution. ■



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1. U.S. Const. art. II, § 2, cl. 2.
2. The Federalist No. 76 (Alexander Hamilton).
3. Elliott E. Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate's Role?*, 64 JUDICATURE 60, 63 (1980).
4. To the question "[d]o you believe the individual citizen has a constitutional right to keep and bear arms?," Cadish responded, "I do not believe that there is *this* constitutional right. Thus, I believe that reasonable restrictions may be imposed on gun ownership in the interest of public safety. Of course, I will enforce the laws as they exist as a judge." Elissa Cadish, Questionnaire, Judicial Candidates Election 2008, Citizens for Responsible Government, May 8, 2008, para. 3, at 1 (emphasis added). At that time, *Nordyke v. King* had interpreted the Second Amendment as guaranteeing only a collective, and not an individual, right. 319 F.3d 1185, 1191-92 & n.4 (9th Cir. 2003) (O'Scannlain, J.). *District of Columbia v. Heller* overruled that interpretation in June 2008 by recognizing an individual right. 554 U.S. 570 (2008).
5. Steve Tetreault, *Reid Seeks to Bypass Heller on Federal Judge Nominee*, LAS VEGAS REV. J., Apr. 25, 2012.
6. *Id.*
7. Mitchell A. Sollenberger, Cong. Research Serv., RL 32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, at 8-9 (Oct. 22, 2003).
8. *Id.* at 9-10, 20-21.
9. Joseph A. Califano, Jr., *Yes, Litmus-Test Judges*, WASH. POST, Aug. 31, 2001, at A23.
10. Rachel Brand, *Judicial Appointments: Checks and Balances in Practice*, 33 HARV. J.L. & PUB. POL'Y 47, 49 (2010).