

Memo

Date: September 25, 2017

To: Reporters, Editors, and Columnists

From: Senator Feinstein, Judiciary Committee Ranking Member

Subject: Setting the record straight on judicial nominees and blue slip

Senate Republicans and conservative interest groups are misrepresenting decades of history in an attempt to eliminate the blue slip, which requires both home-state senators to sign off on judicial nominees before they can advance.

Eliminating the blue slip would be a titanic shift, ending cooperation between the executive and legislative branch on judicial nominees and allowing them to be hand-picked by the White House and outside interest groups.

Such a move would prioritize short-term political gain and allow all future presidents, Republican or Democratic, to select nominees outside the mainstream and disregard the input of senators on judges whose rulings will affect their constituents for decades.

History of the blue slip

Fact: The last time a judge was confirmed without two blue slips was **1989**. Only a handful of judges have been confirmed without two blue slips in the past 100 years.

Fact: During the administrations of Presidents Barack Obama, George W. Bush and Bill Clinton, no circuit court or district court nominees were confirmed without blue slips from both home-state senators.

Fact: During the Obama Administration—including during the six years when Democrats controlled the Judiciary Committee—not a single judicial nominee received a hearing unless both home-state senators approved of the nominee by returning their blue slips.

Fact: In 2016 alone, President Obama's nominations of Abdul Kallon for the Eleventh Circuit, Justice Myra Selby for the Seventh Circuit, Rebecca Haywood for the Third Circuit and Justice Lisabeth Tabor Hughes for the Sixth Circuit did

not move forward because they didn't receive two blue slips. Trump nominees have already been confirmed to two of these vacancies this year. Two Trump nominees are pending.

Fact: During the entire Obama Administration, 18 judicial nominees were blocked because they did not receive blue slips.

Circuit Court

- Assistant U.S. Attorney Rebecca Haywood (Third Circuit-Pa.)
- Kentucky Supreme Court Justice Lisabeth Tabor Hughes (Sixth Circuit-Ky.)
- U.S. District Court Judge Abdul Kallon (Eleventh Circuit-Ala.)
- Victoria Nourse (Seventh Circuit-Wisc.)
- Former Indiana Supreme Court Justice Myra Selby (Seventh Circuit-Ind.)
- Former Kansas Attorney General Steve Six (Tenth Circuit-Kan.)

District Court

- South Carolina Supreme Court Justice Don Beatty (District-S.C.)
- Former Wisconsin Supreme Court Justice Louis Butler (Western District-Wisc.)
- Judge Elissa Cadish (District-Nev.)
- Former Judge Mary Barzee Flores (Southern District-Fla.)
- Judge Alison Lee (District-S.C.)
- Judge Dax Lopez (Northern District-Ga.)

- Assistant U.S. Attorney Jennifer May Parker (Eastern District-N.C.)
- Assistant U.S. Attorney Arvo Mikkanen (Western District-Okla.)
- Judge William Thomas (Southern District-Fla.)
- Natasha Silas (Northern District-Ga.)
- Former North Carolina Supreme Court Justice Patricia Timmons-Goodson (Eastern District-North Carolina)
- Anne Traum (District-Nevada)

Fact: During the Obama administration, Judiciary Committee Democrats did not advance Obama nominees in **any** of the following situations:

- Only one home-state senator returned the blue slip.

- Senators initially returned blue slips but later rescinded them.
- Judicial vacancies were left open for years.
- When Senators had recommended the nominee to the White House in the first place, but then refused to return a blue slip on the same nominee.
- When Senators recommended a nominee to the White House for a district court vacancy, but refused to return a blue slip for that same nominee when nominated to a circuit court vacancy.

Fact: In the Obama Administration, the blue slip was honored even when Senators took years to return their blue slips. Judge Jill Pryor was nominated to the Eleventh Circuit in February 2012, but Senators Isakson and Chambliss did not return their blue slips until April 2014—803 days later.

The blue slip is a time-honored Senate process

Senator Orrin Hatch (R-Utah), former chairman of the Judiciary Committee, wrote in a 2014 op-ed, “I continued this blue slip tradition. Not a single district court nominee received a committee hearing, and not one appeals court nominee was confirmed without the support of their home-state senators...”

As Senator Hatch’s statement indicates, hearings were not held for the overwhelming majority of judicial nominees—including virtually all circuit court judges confirmed in the last several decades—unless both home-state senators returned blue slips.

The bottom line is that no circuit court nominee has been confirmed in the last several administrations without blue slips from both home-state senators.

The blue slip applied to Obama circuit court nominees

Kentucky: Sixth Circuit

- A vacancy was open on the Sixth Circuit in Kentucky from August 2013 to June 2017.
- In March 2016, after the vacancy had been open for almost 1,000 days, President Obama nominated Kentucky Supreme Court Justice Lisabeth Tabor Hughes to the vacancy. Justice Hughes received a unanimous well-qualified rating from the American Bar Association and is a highly-

regarded judge.

- Senators McConnell and Paul did not return their blue slips and Justice Hughes never received a hearing in the Senate Judiciary Committee.
- U.S. District Court Judge Amul Thapar was nominated by President Trump on March 21, 2017. Senator McConnell returned his blue slip just eight days later. Judge Thapar was confirmed in May 2017.

Alabama: Eleventh Circuit

- In February 2016, President Obama nominated Judge Abdul Kallon from the Northern District of Alabama to fill an open seat on the Eleventh Circuit.
- Judge Kallon received blue slips from Senators Shelby and Sessions in 2009 when he was nominated by President Obama to the district court and had been unanimously confirmed. Judge Kallon also received a unanimous well-qualified rating from the American Bar Association when he was nominated to the Eleventh Circuit. He would have been the first African-American judge to sit on the Eleventh Circuit from Alabama.
- Senators Sessions and Shelby did not return their blue slips and Judge Kallon never received a hearing in the Senate Judiciary Committee.
- Because the blue slip was honored for circuit court nominees during President Obama's administration, President Trump was able to nominate Kevin Newsom to this seat on May 9, 2017. Senators Shelby and Strange promptly returned blue slips and Newsom was confirmed in August 2017.

Kansas: Tenth Circuit

- Former Kansas Attorney General Steve Six was nominated by President Obama to a vacancy on the Tenth Circuit on March 9, 2011. Mr. Six received a unanimous well-qualified rating from the American Bar Association and was supported by a bipartisan group of 29 state attorneys general.
- Senators Jerry Moran and Pat Roberts initially returned blue slips on the nomination, and the Judiciary Committee held a hearing on the nomination in May 2011. After the hearing, Senators Moran and Roberts asked

Chairman Leahy not to proceed with the nomination, essentially rescinding their blue slips.

- Out of deference to home-state senators, the committee never voted on Mr. Six's nomination, even though the home-state senators initially returned blue slips on the nomination.

Pennsylvania: Third Circuit

- A vacancy has been open on the Third Circuit in Pennsylvania since July 2015.
- The Obama Administration worked to reach agreement on a nominee with Senators Toomey and Casey but could only reach agreement with Senator Casey.
- In March 2016, President Obama nominated Rebecca Ross Haywood, chief of appeals for the U.S. attorney's office for the Western District of Pennsylvania, to the vacancy.
- Ms. Haywood received a unanimous well-qualified rating from the American Bar Association and would have been the first African-American woman to sit on the Third Circuit.
- Ms. Haywood received a blue slip from Senator Casey. She interviewed with Senator Toomey prior to being nominated, but he did not return a blue slip. She did not receive a hearing in the Senate Judiciary Committee.

Importance of consultation

The blue slip is designed to ensure meaningful consultation between the White House and home-state senators on judicial nominations in their states.

In 2009, every Republican senator signed a [letter to President Obama](#) that went even further, saying that approval—not just consultation—is required.

“Regretfully, **if we are not consulted on, and approve of**, a nominee from our states, the Republican Conference will be unable to support moving forward on that nominee.”

During the Obama Administration, Republican Senators that refused to return blue slips suggested that the White House had failed to properly consult with them—or simply that they did not like the nominee. No matter the reason for declining to return the blue slip, their failure to return the blue slip stopped the Committee from any consideration of the nomination.

Example: Majority Leader McConnell, March 22, 2016 (refusing to return a blue slip on Justice Lisabeth Hughes’ nomination to the Sixth Circuit): “I’ve had a back and forth with the administration for a year and a half or two over that particular seat on the Sixth Circuit and I’m not going to support the person they’ve sent up...I offered some other suggestions that they rejected so I think we’re at a stalemate there.”

Example: Senators Shelby and Sessions, February 11, 2016 (refusing to return a blue slip on Judge Abdul Kallon’s nomination to the Eleventh Circuit): “Throughout the process of meeting with the White House on filling judicial vacancies, we negotiated in good faith to find nominees that will serve our state well... While we thought progress had been made, apparently the White House was never interested in good faith negotiations, and it is too late now.”

Example: Senator Toomey, March 16, 2016 (refusing to return a blue slip on Assistant U.S. Attorney Rebecca Haywood’s nomination to the Third Circuit): “It is so disappointing that – for the first time since I’ve been in the Senate – President Obama is nominating someone for the federal bench in Pennsylvania without the approval of both Senator Casey and me.”

Example: Senator Coats, January 27, 2016 (refusing to return a blue slip on Justice Myra Selby’s nomination to the Seventh Circuit): “Myra Selby’s nomination should be considered by an Indiana Federal Nominating Commission.”

Lack of consultation

Nominees’ questionnaires show the contrast between pre-nomination consultation and interviews with home-state senators under President Obama vs. President Trump. Under Trump, nominees are largely meeting with ONLY Republican senators. Under Obama, nominees met with Republican and Democratic senators.

Trump does not consult on nominees

Stephanos Bibas (Third Circuit Court of Appeals): There is no record of pre-nomination contact with the Democratic home-state senator. (In 2016, Rebecca Ross Haywood was blocked for this seat because Senator Toomey did not return a blue slip.)

Answer #26 on Stephanos Bibas's questionnaire for his nomination:

On March 1, 2017, I was contacted by an official from the White House Counsel's Office, who inquired whether I would be willing to interview for a vacancy on the U.S. Court of Appeals for the Third Circuit. I responded that I would and had follow-up communications with this official shortly thereafter. **On March 3 and 7, I was contacted by Senator Patrick Toomey's staff to arrange an interview with him.**

On March 9, I was interviewed by attorneys from the White House Counsel's Office and the Department of Justice in Washington, D.C. and **on March 10, I was interviewed by Senator Patrick Toomey and his general counsel in Washington, D.C.** After that date, I was in contact with officials from the White House Counsel's Office and officials working for the Office of Legal Policy at the U.S. Department of Justice. On June 7, the President announced his intent to nominate me, and on June 19, he submitted by nomination to the Senate.

Allison H. Eid: (Tenth Circuit Court of Appeals): There is no record of pre-nomination contact with the Democratic home-state senator.

Answer #26 on Allison Eid's [questionnaire for her nomination](#):

In February, 2017, **I spoke with Senator Cory Gardner** regarding the possible vacancy in the event now-Justice Gorsuch was confirmed and appointed to the Supreme Court. On April 9, 2017, I was contacted by the White House Counsel's Office regarding the vacancy. On April 10, 2017, I spoke with White House Counsel Don McGahn regarding the vacancy. **On April 13, 2017, Senator Gardner informed me that the White House had decided to proceed with my nomination.** This was confirmed to me by the White House Counsel's Office on April 20, 2017. Since that time, I have been in regular contact with the White House Counsel's Office and with Department of Justice Office of Legal Policy.

Obama does consult on nominees

Carolyn B. McHugh (Tenth Circuit Court of Appeals): There is a record of pre-nomination contact with both Republican home-state senators.

Answer #26 on Carolyn McHugh's [questionnaire for her nomination](#).

In January 2013, I submitted a cover letter and resume to Senator Orrin Hatch and to Congressman Jim Matheson for a possible position on the Tenth Circuit.

On January 16, 2013, **I interviewed with Senator Hatch and Senator Mike Lee**, and on January 30, 2013, I interviewed with Congressman Jim Matheson. On February 4, 2013, I was notified by Senator Hatch that he and Senator Lee would be recommending me to the White House for consideration.

The following week, I was contacted by an official from the White House Counsel's Office and interviewed with him by telephone. Since February 19, 2013, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On March 20, 2013, I interviewed with attorneys from the White House Counsel's Office and the Department of Justice in Washington, DC. On May 16, 2013, the President submitted my nomination to the Senate.

Julie E. Carnes (Eleventh Circuit Court of Appeals): There is a record of pre-nomination consultation with both home-state senators.

Answer #26 on Julie Carnes's [questionnaire for her nomination](#):

In late February 2013, **I was contacted by my state's two senators, Senator Saxby Chambliss and Senator Johnny Isakson, who inquired whether I would be willing to be recommended to the White House for the open Eleventh Circuit position. I agreed that they could submit my name.** Since September 5, 2013, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On November 21, 2013, I interviewed with attorneys from the White House Counsel's Office and the Department of Justice in Washington, D.C. On December 19, 2013, the President submitted my nomination to the Senate. That nomination was resubmitted on January 6, 2014.

Rebecca Ross Haywood (Third Circuit Court of Appeals): There is a record of pre-nomination consultation and interviews with both home-state senators. Senator Toomey still did not return a blue slip.

Answer #26 on Rebecca Ross Haywood's [questionnaire for her nomination](#):

The Senators in Pennsylvania employ a judicial section committee for identifying 30 candidates to be federal judges. In August 2013, I submitted an application to be considered for the federal bench. On October 23, 2013, I interviewed before the selection committee in Pittsburgh, Pennsylvania. **Subsequently, Senator Casey's staff contacted me and arranged for me to meet the Senator in his Harrisburg office in January 2014. During this meeting, I also interviewed with Senator Casey's chief of staff and his legislative director.**

On February 11, 2014, I was contacted by an attorney with the White House Counsel's Office regarding the possibility of my being nominated to the federal bench. Since February 12, 2014, I have been in contact with officials from the Office of Legal Policy at the Department of Justice.

On February 26, 2014, I met with Senator Toomey and one of his staffers in his office in Washington D.C. On April 9, 2014 and March 23, 2015, I met with attorneys from the White House Counsel's Office and Department of Justice in Washington, D.C. On November 17, 2015, I met with Senator Toomey and two of his staffers in his office in Washington D.C. On March 15, 2016, the President submitted my nomination to the Senate.

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