

JUDICIAL APPOINTMENTS: CHECKS AND BALANCES IN PRACTICE

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Much could be said about the intersection of judicial appointments and the subject of this Symposium, the separation of powers. My own view of how the executive and legislative branches interact and share power when selecting judges to fill the federal courts is very practical. This Essay focuses not on how the two branches *should* relate in an academic or idealistic sense, but on how they *do* relate, based on my personal observations. I first watched this interbranch relationship in action when I assisted with judicial nominations as a lawyer in the White House Counsel's Office at the beginning of President George W. Bush's first term and later as the Assistant Attorney General for Legal Policy in the Justice Department, where my office shepherded judicial nominees through the confirmation process.

The public tends to focus on the President's role in choosing judicial nominees and on the Senate's role in approving or vetoing them after nomination, but the process is an exercise in power sharing well before a nomination is made. In practical (as opposed to constitutional) terms, the home-state senators are almost as important as—and sometimes more important than—the President in determining who will be nominated to a particular lower-court judgeship. Senate procedure and tradition effectively give individual senators veto power over nominations for judgeships located in their respective states.

When the President makes a nomination, both home-state senators receive a "blue slip"¹—a blue piece of paper that the senator returns to the Senate Judiciary Committee indicating

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1. See Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 76 (2001).

whether he is willing to allow the nomination to move forward. If one of the home-state senators wants to derail a nomination, he can return the slip with a negative indication or simply never return it to the Committee at all.² Because the Committee chairman usually will not hold a confirmation hearing for a nominee until both home-state senators have returned positive blue slips, the nomination will then languish indefinitely, and the judgeship will remain vacant.³

Understandably, presidents prefer that their nominees are not blue-slipped, and thus typically consult with home-state senators before making nominations. Consultation can have a variety of meanings. Presidents tend to be especially deferential to senators' wishes regarding district court vacancies, and some senators seem to believe they have unrestricted control over appointments to lower-court judgeships. To achieve some balance between senators' wishes and the President's constitutional prerogatives, President George W. Bush asked home-state senators to recommend at least three names for each district court vacancy. He received varying levels of acquiescence with that request, ranging from cooperation to complete disregard.

Recent presidents have tended to be less deferential to home-state senators' wishes regarding circuit court nominations. President George W. Bush made it known that, although he would consider senators' views on circuit court nominations, he would leave himself more discretion in selecting nominees to appellate courts.⁴ This approach was met with varying receptions among senators, some of whom regard circuit court nominations, like district court nominations, to be their pre-

2. See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 89 (2005).

3. See *id.* It has been the policy of some Committee chairmen, however, to move forward with a nomination in the absence of two positive blue slips. See Denning, *supra* note 1, at 76 n.5 ("In the 1980s, Senator Kennedy announced that the blue slip would no longer be an automatic veto; Senator Hatch claims to have followed that practice, but others dispute his characterization."); see also MITCHEL A. SOLLENBERGER, *CONG. RESEARCH SERV.: THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917–PRESENT* 26 (2003), available at <http://opencrs.com/document/RL32013/> (comparing the blue slip policy of Committee chairmen from 1956 through 2003).

4. See Kevin M. Scott & Rorie Spill Solberg, *Remaking the Bench: An Exercise in Futility*, 32 S. ILL. U. L.J. 493, 496–97 (stating that President Bush "generally articulated respect for the wishes of the home-state senators, but occasionally . . . nominated an individual who was opposed by their home-state senators").

rogative. In one example, a senator held a press conference to announce his selection for a judgeship before even providing the name to the White House, stating erroneously that he had “nominated” that person to the bench.

Recent press accounts indicate that President Obama shares President George W. Bush’s policy regarding circuit court appointments. His counsel, Gregory Craig, reportedly said as much to Democratic senators, eliciting a less-than-enthusiastic response from the caucus.⁵ The bottom line, however, is that the Senate currently uses the blue-slip process for circuit court nominations, just as it does for district court nominations. A President acts at his peril if he makes a circuit court nomination that is objectionable to the home-state senators.

Note that the blue-slip process is not mandated by any law or formal Senate rule. The Judiciary Committee chairman could decide not to honor the process as a blanket rule or in individual cases.⁶ Over the years, there has been some variation in how strictly chairmen observe the practice.⁷ Nonetheless, recent chairmen, despite hinting that they might not observe it strictly, effectively have treated it as a requirement. Senator Arlen Specter, Chairman of the Judiciary Committee from 2005 to 2007, left himself some wiggle room by never making a definitive statement about whether or in what circumstances he might move a nomination forward in the absence of two positive blue slips. In practice, however, he required positive blue slips from both senators. More recently, Chairman Leahy observed the blue slip policy strictly during the last two years of the Bush Administration, but said in February of 2009 that he was “look[ing] very carefully” at the blue slip policy,⁸ suggesting that he might reconsider his practice. This drew sharp com-

5. See Neil A. Lewis, *Obama’s Court Nominees Are Focus of Speculation*, N.Y. TIMES, Mar. 11, 2009, at A19 (reporting that Mr. Craig, when meeting with Democratic senators, “warned that filling the appeals courts was largely a presidential prerogative,” and that one senior aide believed that “such an effort to limit Democratic senators’ role [in filling the appeals courts] could create friction”).

6. See, e.g., EPSTEIN & SEGAL, *supra* note 2, at 89 (noting that Senator Ted Kennedy, during his tenure as Chairman of the Judiciary Committee, altered the blue-slip policy to hold hearings on nominees even “if the home-state senator failed to return a positive blue slip”).

7. See, e.g., *id.*; SOLLENBERGER, *supra* note 3, at 26.

8. Keith Perine, *Leahy Coy on New ‘Blue Slip’ Policy*, CQ TODAY ONLINE NEWS, Feb. 4, 2009, <http://www.cqpolitics.com/wmspage.cfm?docID=news-000003024470>.

plaints from Senate Republicans, who demanded that he obey blue slips, and Chairman Leahy apparently relented.⁹

The preceding discussion relates to the Senate's interaction with the President prior to nomination. After a nomination, the Senate exercises its constitutional "advice and consent" function¹⁰ both as a body and through the actions of individual senators. The Senate's institutional role is well-known: No nominee can become a judge without winning a majority vote in the full Senate. But individual home-state senators continue to wield power after nomination as well through their decision about whether to return a blue slip.

One might wonder who the home-state senators are for a court of appeals nomination, considering that no federal judicial circuit encompasses only one state. Federal law does not dictate which court of appeals seats reside in which states within a circuit. The only relevant statute requires that each state in a circuit have at least one seat.¹¹ Nevertheless, there is a strong tradition of particular court of appeals seats "belonging" to particular states, and the legal communities and senators in each state have definite views on the matter.

In addition to lacking any legal basis, these allocations frequently lack practical justification. In the Fourth Circuit, for example, four seats were treated during the Clinton and George W. Bush Administrations as "belonging" to South Carolina,¹² which had an estimated population of just under 4.5 million in 2008.¹³ Yet North Carolina, which had more than

9. See Keith Perine, *Leahy to Advance Judicial Nominees Only with Support of Home-State Senators*, CQ TODAY ONLINE NEWS, Mar. 11, 2009, <http://www.cqpolitics.com/wmspage.cfm?docID=news-000003072594>.

10. U.S. CONST. art. II, § 2.

11. 28 U.S.C. § 44(c) (2006) (providing that "[i]n each circuit (other than the Federal judicial circuit) there shall be at least one circuit judge in regular active service appointed from the residents of each state in that circuit"). This requirement was added to the U.S. Code after Hawaii-based Ninth Circuit Judge Herbert Choy was replaced by Nevadan Melvin Brunetti, leaving that court with no Hawaii judge for over a decade. See 143 CONG. REC. 3223 (1997) (statement of Rep. Abercrombie).

12. Gary L. Wright & Jim Morrill, *White House Evaluates Diaz for 4th Circuit*, CHARLOTTE OBSERVER, Oct. 9, 2009, available at <http://www.charlotteobserver.com/408/story/992162.html>.

13. United States Census Bureau, Annual Estimates of the Resident Population for the United States, Regions, and Puerto Rico: April 1, 2000 to July 1, 2008, <http://www.census.gov/popest/states/NST-ann-est.html> (last visited Oct. 29, 2009).

twice as many people (over 9.2 million) in 2008,¹⁴ claimed only two seats.¹⁵ The reasons for lopsided allocations such as this one often depend on political factors such as the relationships between particular senators and presidents, or which state's senators were more powerful within the Senate at the time of the judgeships' creation.

Presidents can, and sometimes do, "move" a judgeship from one state to another. Continuing the Fourth Circuit illustration, President Obama recently nominated a North Carolinian to a seat that had previously been held by a South Carolinian. While President Obama did not state his reasons for doing so, it is noteworthy that North Carolina's Democratic senator publicly called for the seat to be moved and that South Carolina has two Republican senators. However, such inter-state shifts normally meet with stiff resistance, and presidents do not attempt them lightly.

Occasionally, the course of historical events has created a dispute between two states as to which state "owns" a particular seat, putting the White House in an awkward situation. One recent example has kept a judgeship on the Ninth Circuit vacant for several years. In 2004, Judge Trott of the Ninth Circuit took senior status, leaving a vacancy for the President to fill.¹⁶ Judge Trott originally hailed from California, though he was working at the Justice Department in Washington, D.C., at the time of his nomination.¹⁷ President Reagan appointed him in 1988 to fill a seat that was understood at the time to "belong" to California.¹⁸ But upon his appointment, Judge Trott moved from Washington, D.C., to Idaho and set up his chambers there.¹⁹ Since Idaho is also in the Ninth Circuit, nothing legally prevented him from doing this. But upon his retirement, it created a standoff between the senators from California and Idaho as to which state was entitled to the judgeship.²⁰ This conflict was

14. *See id.*

15. *See* Wright & Morrill, *supra* note 12.

16. Kathleen Kreller, *Trott: Senator was Wrong; He Did Not Live in California*, IDAHO STATESMAN, Mar. 4, 2006, at 1.

17. *Id.*

18. Statement by Senator Dianne Feinstein on the Nomination of Randy Smith to the 9th Circuit Court of Appeals (Mar. 1, 2006), *available at* <http://feinstein.senate.gov/06releases/r-smith-hold.pdf>.

19. *See* Kreller, *supra* note 16.

20. *Id.*

never resolved during the Bush Administration, and Judge Trott's seat remains unfilled five years later.²¹

If a nominee passes the blue-slip hurdle, he must still get past the chairman of the Judiciary Committee.²² The Committee chairman controls the Committee's schedule. While this may sound like a ministerial power, it is not. It is the power to quietly kill a nomination simply by never moving it forward. After all, a nominee will never become a judge if he never gets a hearing or a vote. Republican senators and President George W. Bush criticized Chairman Leahy for exercising this power to deny hearings to a number of nominees during the last two years of President Bush's term.

If the chairman does schedule a hearing, the nominee will then face the full Judiciary Committee and, if he receives a positive vote from a majority of its members, will receive a vote by the full Senate. The confirmation hearing process is well-known to many members of the American public, and I will not address it here.

Even after the full Senate confirms a nominee, the interplay between the branches continues. Many people gloss over the fact that the Constitution grants the president two distinct powers relating to judicial selection—nomination and appointment. The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court."²³ Therefore, the Senate does not have the final word. No one becomes a judge before being separately appointed by the President; appointment is effected when the President signs the judge's commission. Theoretically, the President could change his mind at the last minute—even after Senate confirmation—and decide not to appoint the judge after all. The President's signature on a commission ends the collaboration or, depending on the circumstances, the battle between the executive and legislative branches and launches the new judge into the third branch, where he will be completely independent of the two political institutions on which his fate so recently depended.

21. See Article III Judicial Vacancies, Current Judicial Vacancies, <http://www.uscourts.gov/judicialvac.cfm>.

22. See, e.g., EPSTEIN & SEGAL, *supra* note 2, at 89.

23. U.S. CONST. art. II, § 2.