
Where Do Institutions Come From? Exploring the Origins of the Senate Blue Slip

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Perhaps the most striking feature of the Senate's practice of advice and consent today is the deference accorded home state senators in reviewing presidential appointments to the federal bench. Although the Constitution calls for the advice and consent of the Senate body, informal norms of the Senate provide home state senators with a potential veto of nominations to fill federal judgeships within their states. One norm—senatorial courtesy—historically ensured that senators would defer to the views of the home state senator from the president's party. Another practice—the Senate “blue slip”—allocates special procedural rights to both home state senators regardless of political party. A single objection from a home state senator from either party has historically been considered sufficient to defeat confirmation of a nominee. The blue slip also allows home state senators to influence the course of nominations prospectively—encouraging presidents to heed the preferences of home state senators in selecting new federal judges.¹

Why would the Senate devise a practice like the blue slip that appears today to undermine a long-standing norm of the chamber? If, as Kermit Hall suggests, federal judgeships were historically dispensed as party patronage, one would hardly expect

senators to create a practice in which opposition party senators were allocated the same procedural rights afforded to the president's partisans.² In this article, I offer competing accounts of the blue slip's origins, and use Senate archival records to match the fit of the explanations to the creation of the blue slip. Although a “smoking gun” proves elusive, I find little evidence that the practice was *intentionally* constructed to undermine the influence of the president's party over the makeup of the bench. Rather, the blue slip's power appears to have evolved as an unintended consequence of an effort to reduce uncertainty about the prospects of confirmation for the president's lifetime appointments to the bench. I conclude with a brief exploration of the blue slip's implications for our understanding of how and why political institutions such as the Senate evolve. In contrast to accounts that highlight the impact of rational calculation on the design of new institutions, the history of the blue slip suggest that unintended consequences may pervade the development of congressional rules and norms.

THE PUZZLE OF THE BLUE SLIP

Each time a president makes an appointment to the lower federal bench, the Senate refers the nomination to the Senate Judiciary Committee for consideration. As part of the confirmation process, the panel's counsel sends a “blue slip” to each of the two home state senators for the nomination. Literally a blue sheet of paper, the blue slip asks each home state senator for his or her opinion regarding the

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1. See Sheldon Goldman, *Picking Federal Judges* (New Haven, CT: Yale University Press, 1997); and Sarah A. Binder and Forrest Maltzman, “The Limits of Senatorial Courtesy,” *Legislative Studies Quarterly* 29 (2004): 5–22.

2. Kermit Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System, 1829–1961* (Lincoln: University of Nebraska Press, 1979).

nominee. If the senator signs and returns the blue slip with an endorsement, the senator signals his or her support for the nominee. If the senator returns the slip with a note objecting to the nominee or if the senator fails to return the blue slip, the senator signals his or her intention to oppose the nominee. Because the Senate Judiciary Committee chair has historically heeded the views of the home state senator, scholars of judicial selection have come to share the views of Judiciary Committee staff, who in 1979 argued that the blue slip was a mechanism for “institutionalizing senatorial courtesy within the [Judiciary] committee as an automatic and mechanical one-member veto over nominees.”³

Numerous students of judicial nominations have relied upon this characterization of the blue slip, arguing that the blue slip institutionalized senatorial courtesy by creating a routine practice for soliciting the views of home state senators during the confirmation process.⁴ But the blue slip did not simply institutionalize senatorial courtesy: it transformed it in two important ways. First, the blue slip today empowers home state senators regardless of party. Originally, senatorial courtesy had been reserved for senators from the president’s party as a means for forcing the president to consider Senate views in allocating patronage.⁵ As Joseph Harris notes in his history of advice and consent, there was at best “uneven extension” of the norm to opposition party senators—not surprising given that there was no expectation that such senators would be afforded the opportunity for patronage.⁶

Allowing opposition party senators to weigh in on judicial nominations is puzzling, as the blue slip potentially undercuts the privileged role of the president’s partisans in shaping the selection and confirmation of new federal judges in their states. Moreover, the blue slip currently increases the influence of the opposition party regardless of whether party control of the White House and Senate is unified or divided. In periods of divided control, the blue slip provides opposition party senators with a tool to block nominees.⁷ In periods of unified control, opposition party senators can exploit the

blue slip to retard confirmation of nominees. Given the value of senatorial courtesy to home state partisans of the president, it seems especially puzzling that the blue slip would have been extended to senators from both political parties.⁸

The blue slip transformed senatorial courtesy in a second way as well. Senatorial courtesy is typically conceived of as an informal norm of deference within the Senate chamber.⁹ In contrast, the blue slip leaves a paper trail. By creating the blue slip practice, the views of home state senators became known in writing to the Judiciary Committee chair and his panel colleagues, and by extension to the home state senators’ chamber colleagues. By creating a routine paper trail of correspondence between the committee chair and the home state senators, the blue slip altered the flow of information—reducing uncertainty about the nominee’s confirmation prospects. It also reshaped senators’ expectations regarding the confirmation of new federal judges. Senators came to expect that their objections to nominees recorded via the blue slip would be heeded by their chamber colleagues. In short, by creating the blue slip, senators manufactured a potential veto tool for home state senators regardless of whether or not they hailed from the president’s party.

Perhaps not surprisingly, over the latter half of the twentieth century, the blue slip came to be considered as a tool that could be used by partisan foes of the president to limit his power of appointment. Its impact is seen particularly in periods of divided party control, when the opposition party controls the Senate and its committee agendas. When presidents seek to appoint new judges to the federal district and appellate courts in a period of divided government, extreme ideological foes of the president exploit the blue slip to limit the president’s discretion—as evidenced by the difficulty presidents have in selecting nominees when one of the home state senators differs strongly in ideological terms with the president.¹⁰ The impact of a “negative” blue slip from a home state senator of the opposing party is also felt during the confirmation stage. Once a nomination has been forwarded to the Senate in a period of divided government, Senate action is delayed significantly if one of the opposing party’s home state senators is ideologically distant from the president.¹¹ Jesse Helms’ (R-NC) success in the late 1990s in blocking President Bill Clinton’s appointments to the Fourth

3. Judiciary Committee Staff to Senator Kennedy, Re: senatorial courtesy, 22 Jan. 1979, in U.S. Senate, Committee on the Judiciary, *Selection and Confirmation of Federal Judges*, Hearing, 96th Cong., 1st Sess., 25 Jan. 1979, pt. 1.

4. For example, see Brannon Denning, “The ‘Blue Slip’: Enforcing the Norms of the Judicial Confirmation Process,” *William and Mary Bill of Rights Journal* 19 (2001): 75–102; and Benjamin Wittes, *Confirmation Wars: Preserving Independent Courts in Angry Times* (Lanham, MD: Rowman and Littlefield, 2006).

5. See Elliott Slotnick, “Reforms in Judicial Selection: Will They Affect the Senate’s Role?” *Judicature* 64 (1980): 60–73.

6. Joseph Harris, *The Advice and Consent of the Senate* (Berkeley: University of California Press, 1953), 224.

7. On the pronounced effect of the blue slip in periods of divided government, see Binder and Maltzman, “Limits of Senatorial Courtesy.”

8. See Michael W. Giles, Virginia A. Hettinger, and Todd Peppers, “Picking Federal Judges: A Note on Policy and Partisan Selection Agendas,” *Political Research Quarterly* 54 (2001): 623–41.

9. See Lewis A. Froman Jr., “Organization Theory and the Explanation of Important Characteristics of Congress,” *American Political Science Review* 62 (1968): 518–26.

10. See Sarah A. Binder and Forrest Maltzman, “Senatorial Delay in Confirming Federal Judges, 1947–1998,” *American Journal of Political Science* 46 (2002), 190–9.

11. See Binder and Maltzman, “Limits of Senatorial Courtesy.”

Circuit Court of Appeals, despite apparent supermajority support for the nominees, attests to the power and importance of the blue slip. Even if an opposition party senator only succeeds in delaying confirmation of a nominee, delay is typically consequential, as it can keep judgeships on swing courts vacant for prolonged periods. In short, the blue slip provides a procedural tool for opposition party senators who would have an incentive to make it harder for the president to fill vacant judgeships in their states.

If the blue slip can be exploited by ideological foes of the president and his party, particularly in periods of divided government, why did the Senate transform senatorial courtesy in this way? This is of course both a theoretical question about the forces that bring change in political institutions and an empirical question about the development of advice and consent practices in the Senate. In the following section, I advance four potential explanations that might account for the Senate's decision to broaden the allocation of procedural rights over judicial selection. I then turn to the historical record to uncover the creation of the blue slip and to determine the fit of the competing accounts to the origins of this Senate practice.

COMPETING EXPLANATIONS

Why might a procedural right be extended to senators of both political parties? I suggest four alternative accounts, each with an eye on partisan and institutional imperatives that may shape senators' views about the rules of the game. Because the four accounts vary along these partisan and institutional dimensions, they each generate a different set of predictions about the conditions under which the blue slip might have been created.

Interparty Competition: "The Power Play"

The first potential explanation relies on a view of institutional choice as the outcome of short-term instrumental action by players seeking political advantage. Under this account, changes in institutional practices would be the brain-child of senators seeking to increase their leverage over the selection of judges in their home states. Because senators from the president's party could simply rely upon senatorial courtesy, we would expect the blue slip to be an invention of opposition party senators. And given that the opposition party would only be able to cement an innovation in Judiciary Committee practices if they controlled the Senate, this account suggests that majority party senators in a period of divided government created the blue slip to purposefully undercut senatorial courtesy. In short, we can think of the invention of the blue slip as a power-grab by the majority party intended to increase the opposition

party's leverage over appointments when it did not control the White House.

How then under this scenario might the blue slip be extended to all senators? One can assume that when the blue slip was first created, it was invented by the Senate's governing party and extended only to majority party members. Dealing in the president's party (serving as the minority party) under this scenario would not be rational for two reasons. First, the president's partisans already benefited from the norm of senatorial courtesy, meaning that there would be no political cost to devising a new practice that excluded the minority. Second, as the minority party, the president's partisans would have limited leverage to influence the adoption of new institutional practices. More likely, the majority would have sought to craft an institutional change that benefited their party's short-term interests in influencing the selection of federal judges. To be sure, that same majority party might insist on access to blue slips if it ever became the minority party in a period of unified control (when again their party did not control the White House). But if one seeks to explain the origins of the Senate blue slip, taking seriously senators' short-term calculations about preferable rules would lead one to expect that the blue slip would be extended to opposition party senators serving in the majority party and would be created in a period of divided party control.

Interparty Competition: Electoral Uncertainty

If politicians view the rules as instruments for securing their immediate and short-term interests, then one would expect them to discount significantly their parliamentary future when making choices about institutional matters. Politicians need not be quite so short-sighted, however, when forming their preferences about institutional arrangements. An alternative perspective might suggest that senators are primarily concerned with their long term parliamentary future in the institution when devising new parliamentary rules. Rather than viewing these rules as instruments for securing short-term goals, senators might instead view institutions as durable structures that cement their prospects for exercising future control.

Scholars who have studied the extension of procedural rights in the House of Representatives to minority party members have found relatively little support for models in which legislators alter the rules in anticipation of their future parliamentary status.¹² As Jack Knight suggests, given uncertainty about the future, actors are *more* likely to discount

12. For example, see Sarah A. Binder, *Minority Rights, Majority Rule* (New York: Cambridge University Press, 1997); and Douglas Dion, *Turning the Legislative Thumbscrew* (Ann Arbor: University of Michigan Press, 1997).

the future, and thus make choices about institutions based on short-term distributional advantage.¹³ Moreover, unless both parties can make credible commitments to protect such rights in the future, current majorities cannot count on the maintenance of the new rights.

Still, such long-term forecasting might in fact be quite prevalent amongst senators when thinking about the institutions of advice and consent. Given the broad and lasting impact of federal judges serving life-time terms, senators might have a strong incentive to prepare for their future parliamentary needs, rather than their immediate interests. If so, and given a moderate level of uncertainty about whether or how long their party will control the Senate, we might expect majority party senators to agree to send blue slips to senators of both political parties. Extending the blue slip to the minority party would improve the majority's prospective influence over filling court vacancies should the majority lose control of the chamber. Given the importance of court appointments and given senators' six-year terms, we might expect senators to be more future-thinking than their counterparts in the House.

Varying the degree to which senators might discount the future thus leads to two different interpretations based on interparty competition over the shape of the judiciary. Although the accounts differ on how they treat electoral uncertainty, both accounts lead us to expect that the blue slip would be created in a period of divided government. In the "power play" version, the majority party would create the blue slip to increase its immediate leverage over the appointment of federal judge in their states when their party did not control the White House. In the "electoral uncertainty" version, we would expect the blue slip to be devised in a period of divided government to guarantee the majority party future influence over nominations should it lose control of the chamber. (In a period of unified control, majority party senators would have little reason to extend senatorial courtesy to the minority party; as such a move would undercut the majority's influence over the selection of nominees.) Thus, both accounts are rooted in an appreciation of how partisan competition in a period of divided control might structure senators' views about the rules of advice and consent. But the accounts differ markedly in the way in which they invoke the shadow of the future. Discounting the future leads to a narrow crafting of the blue slip as a majority party veto power; focusing on a party's longer term parliamentary future leads to an expansive blue slip that allows all senators to weigh in on judicial nominations.

13. See Jack Knight, *Institutions and Social Conflict* (New York: Cambridge University Press, 1992).

Intraparty Competition

Disputes over the selection of judicial nominees need not be limited to differences between the parties. As Sheldon Goldman suggests, disagreements between the White House and home state senators can arise with some regularity.¹⁴ At times, such disputes arise for purely political reasons as competing factions of a state party may prefer different candidates to fill a vacancy. Teddy Roosevelt, for example, in making an appointment to the Seventh Circuit Court of Appeals in 1901 took sides in a dispute between the two Indiana senators (Albert Beveridge and Charles Fairbanks) who represented opposing factions in the Indiana GOP and who advocated competing candidates for the vacant judgeship.¹⁵ Roosevelt rejected the candidate of the senator aligned with one of Roosevelt's potential challengers, instead selecting the candidate of the senator more closely aligned with Roosevelt.

When presidents place a higher priority on judicial nominees' policy views, we also tend to see intraparty disputes over nominees that arise over policy considerations. Disagreements between Woodrow Wilson and several Midwestern Democratic senators arose, for example, over appointments to fill appellate court vacancies, when senators' preferred candidates lacked sufficient progressive credentials.¹⁶ By reconstructing the paper trail in the papers of Wilson's attorney general, Raymond Solomon is able to determine that Wilson routinely selected the nominee with the best public record on progressive issues, including labor and antitrust issues.

Why might such intraparty disputes encourage senators to devise the blue slip? Unlike the interparty interpretations, which suggest the blue slip was intentionally designed to bolster the opposition party's influence during advice and consent, this account suggests that the blue slip might have been intended to bolster senatorial courtesy rather than to derail it. Because intraparty disputes arise when presidents discount the advice of the home state senators from the president's party, the blue slip might have been the institutional response of senators seeking to make the president more responsive to senators' interests. By creating a formal paper trail of senators' views on nominees, the blue slip would have expanded the scope of conflict over disputed nominees. Rather than confining the disagreement to a senator and the president's staff, the blue slip would have been a means for, in E.E. Schattschneider's terms, "socializing

14. Goldman, *Picking Federal Judges*.

15. Raymond L. Solomon, "The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeal Judgeships from T.R. to F.D.R.," *American Bar Foundation Research Journal*, 9 (1984): 285-344.

16. *Ibid.*, 314-20.

conflict” over judicial vacancies.¹⁷ The blue slip might also then be a valuable means for senators from the “wrong” state party faction to increase the visibility of their objections to the president’s and potentially the other home state senator’s nominee(s).

The intraparty account of the blue slip’s origin yields a different prediction about the timing of the blue slip’s creation. Unlike the interparty accounts that lead us to suspect that the blue slip would have been created in a period of divided government, the intraparty account suggests that the blue slip is a creation of the majority party under unified party control. In this case, the president’s partisans—in control of the chamber’s committees and thus in a position to craft a new practice—would have invented the blue slip to bolster their influence over the selection and confirmation of new federal judges. By establishing a paper trail, senators would have invented a mechanism for announcing their views about the president’s nominees thus improving the probability that fellow senators might be more likely to defer to their views. Moreover, the expectation that senators’ views would be formalized and potentially made public would have created a tool which senators might have used as leverage to encourage White House responsiveness to their preferred candidates. Granted, it would take nearly a century before the Judiciary committee routinely made blue slips public. But presidents already faced the possibility that home state senators would go to the floor to declare nominees “personally obnoxious,” and thus noting their objection to confirmation.

Finally, under the intraparty conflict account, we would expect the original blue slip to have been extended only to members of the majority party. If the blue slip under this scenario would have bolstered senatorial courtesy by strengthening the hands of senators from the president’s party, extending the blue slip to the minority party would have made little sense. At the same time as senators were attempting to increase their leverage over appointments, they might have been handing the opposition party a potential veto tool over those candidates. That said, majority party senators might have reasoned that the governing majority could simply ignore objections from the minority party. By this logic, extending the blue slip to the minority would offer little penalty. Of course, when recent majority parties in the Senate have attempted to ignore blue slips from opposition party senators, they found themselves facing minority-party led filibusters against numerous appellate court nominees.¹⁸ Thus, we might expect that senators trying to improve their position in the advice and consent game would have preferred to limit the blue slip to the majority party.

Managing Uncertainty

Of the three party-based accounts offered thus far, only one account leads us to expect that the blue slip would be extended to senators regardless of their party or party status. That explanation requires that senators’ views about desirable rules be shaped directly by their long-term parliamentary interests. But given doubts in the literature about the impact of such future-thinking, one might reasonably wonder about the conditions under which senators’ short-term interests could motivate them to extend procedural rights to the minority. Here, we have to think beyond the dictates of parties and their competition with the president, and think instead about how the blue slip might have affected the handling of nominations in the Senate chamber.

Instead of conceptualizing the blue slip as a tool for senators seeking advantage against the executive branch, the fourth account addresses the institutional ramifications of creating the blue slip. To do so, consider the handling of nominations before advent of the blue slip. Given the informality of senatorial courtesy, there was no guarantee that a senator’s views about a nominee would be made known early in the confirmation process or with any regularity. Moreover, given the limit of senatorial courtesy to senators from the president’s party, objections from opposition party senators would potentially remain unknown to the Senate Judiciary Committee chair or the party leader before a nomination was considered on the Senate floor. Given the lack of a majority cloture rule that would allow the president’s party to block opposition to a nominee quite easily and, given the lack of any cloture rule at all in the Senate for more than 100 years, senators seeking to block confirmation had quite a number of tools at their disposal—including the filibuster or otherwise denying consent to the floor manager.

The creation of the blue slip, however, forced home state senators to go first in revealing their positions during the confirmation process. Through the blue slip, the views of both home state senators would be available in writing to the Judiciary panel chair and his panel colleagues, and, by extension, to the home state senators’ chamber colleagues. By creating a routine paper trail revealing the preferences of the home state senators—regardless of party—the blue slip altered the flow of information, thus reducing uncertainty about the nominee’s confirmation prospects. Blue slips revealing senators’ opposition would enable the Judiciary chair to avoid potentially costly legislative battles—costly to the president seeking to fill the bench, the president’s party seeking to keep peace in the political family, and to the Senate majority party seeking to protect the party’s reputation and manage the uncertainty inherent in legislative life. Given the potential of nominations to trigger filibuster fights and the

17. E. E. Schattschneider, *The Semi-Sovereign People: A Realist’s View of Democracy in America* (New York: Holt, Reinhart, and Winston, 1960).

18. Marcia Coyle, “Awaiting Fate of the ‘Filibuster 10,’” *The National Law Journal*, 15 Nov. 2004.

potential for senators to take other legislative measures hostage to gain leverage against a confirmation, a premium would be placed on reducing uncertainty about a nominee's prospects before expending resources and time on a potentially risky appointee.

For the blue slip to reflect an innovation of committee or party leaders seeking to improve their management of the Senate's executive session, the practice would undoubtedly have been created during a period of unified party control. Presumably chamber leaders would primarily want to reduce uncertainty about the prospects of confirmation when their own party controlled the White House. Improving the predictability of confirmation is only likely to motivate senators with an interest in seeing their own party's nominees confirmed. Given that senatorial courtesy would mean that most of those nominees would be the choice of the president's partisans, the blue slip only makes sense as a product of unified government.

Thinking of the blue slip as a means of reducing uncertainty also leads us to expect that the blue slip would be extended to members of the minority party during a period of unified control. By extending the blue slip to minority party senators, the majority would gain an early warning to flag contested nominees—a tool that the inherited practice of senatorial courtesy would not have routinely provided. Had inventors of the blue slip only intended to increase information flow about nominees referred to committee, offering a blue slip to minority party senators probably would not have been seen as creating a new procedural right for the minority. Transformation of the blue slip into a veto power for the minority would thus be a future and unintended consequence of an effort to improve control of the agenda.

Origins of the Senate Blue Slip

Although existing treatments of judicial selection often note the existence of the blue slip practice, few offer any insight on the reasoning behind its creation or even the date it was adopted. For example, neither Joseph Harris's 1953 treatise on senatorial courtesy nor Harold Chase's 1972 examination of judicial selection make any reference to the blue slip practice.¹⁹ In fact, among the few who have examined the use of the blue slip, little is said about its origins. One scholar, Alan Neff, suggests that the blue slip practice was invented in the early 1950s, probably during Mississippi Democrat James Eastland's tenure as chair of the Senate Judiciary

19. See Harris, *Advice and Consent*, and Harold Chase, *Federal Judges: The Appointing Process* (Minneapolis: University of Minnesota Press, 1975). Although Chase is likely referring to the blue slip when he states that the "committee automatically checks with the senators of the state where the nominee will hold his post"; however, he does not discuss the practice further (*ibid.*, 20).

Committee—although he provides no supporting evidence for this claim.²⁰ In fact, empirical support for Eastland's role in creating the blue slip is slim. Save for a lone reference in a 1979 Judiciary Committee staff study, I find no evidence of Eastland's hand in the practice's creation. According to that staff report, "the blue slip has been used for over 25 years, according to former committee staff members."²¹ Simple arithmetic leads to the conclusion that the process was created around 1954, just before Eastland took control of the committee in 1956.

Coverage of judicial nominations in the *New York Times* and *Washington Post*, however, raises doubts about the 1950s genesis of the blue slip. Granted, the first explicit reference to the blue slip does not appear until 1967, when Senator Jacob Javits (R-NY) held up a judicial nominee who had been recommended by his fellow New York senator, Robert F. Kennedy. "Senator Javits said in an interview," the *Times* reported, "that he had not returned the so-called 'blue slip'—the required form stating that he has no objections to the nomination—to the Senate Judiciary Committee."²² In the 1940s, however, *Washington Post* coverage of Senator Wilbert (Pappy) O'Daniel's (D-TX) opposition to a Roosevelt judicial nominee notes that O'Daniel "returned to the Judiciary Committee the formal notification it sends all senators who might be interested in nominations, with this single notation: 'This nomination is obnoxious to me'."²³ This suggests that use of blue slips predates the 1950s.²⁴

To identify the origins of the blue slip, I turn to the records of the Senate Judiciary Committee.²⁵

20. Alan Neff, *U.S. District Judge Nominating Commissions: Their Members, Procedures, and Candidates* (Chicago, IL: American Judicature Society, 1981), 146.

21. "Letter to Senator Kennedy from Judiciary Committee staff re senatorial courtesy, Jan. 22, 1979," as published in the appendix to *Selection and Confirmation of Federal Judges*, Hearing before the Committee on the Judiciary, United States Senate, 96th Congress, 1st session, GPO 1979.

22. Richard Madden, "Javits Delaying A Judgeship Here," *New York Times*, 14 Dec. 1967, 82.

23. Obnoxious indeed. The nominee, former Texas Governor James Allred, had resigned a federal district judgeship to run against O'Daniel. Allred's subsequent nomination to the 5th Circuit Court of Appeals was said to be a "political payoff" for his attempt to unseat the Anti-New Deal Democrat [O'Daniel] ("O'Daniel considers Allred 'Obnoxious'," *Washington Post*, 16 Mar. 1943, 8).

24. The first negative blue slip—or at least the first failure to return the blue slip to the committee—by an opposition party senator appears to have occurred in 1926. Republican Calvin Coolidge's nomination of William Josiah Tilson was reported adversely from the Judiciary Committee in June 1926, and, though he received two recess appointments to the Middle District of Georgia, Tilson was never confirmed. Both senators from Tilson's home state of Georgia were Democrats.

25. National Archives and Records Administration (NARA), Record Group (RG) 46, Records of the U.S. Senate, Committee on the Judiciary (hereafter NARA: SJC).

UNITED STATES SENATE.

DATE.	ACTION.
Sep. 19, 1913	Inquiry addressed to each Senator from State whence person nominated.
" " "	Papers and information requested of Attorney General.
" 22 "	Reply received from Attorney General.
" 29 "	Mr. O'Donnell authorized to report favorably.
" 29 "	Mr. authorized to report adversely.
Sept. 22, 13	Senator Brandegee writes that he has no objection to confirmation.
" 27, "	" McLean's Secretary reports that the Senator has no objection.
" 29, 13	Confirmed.

Fig. 1. Executive docket, Senate Judiciary Committee 63rd Congress.

Available in the committee papers at the National Archives are notes from committee business meetings, the committee's "executive docket," and nomination files for individuals referred to the committee before 1956.²⁶ The committee meeting notes reveal nothing about the committee's decision to create the blue slip. Neither do the nomination files appear to be reliable for dating the origins of the blue slip. Although the first evidence of the use of blue slips appears in the nomination files for the 65th Congress (1917–1919), the executive docket books suggest that the blue slip practice was already in place by that time.²⁷

Extending from the 39th Congress (1865) through the 77th (1943), the committee's executive docket books track the passage of nominations into and out of the committee, and typically record the final confirmation outcome. Based on the docket books, it appears that the practice of soliciting the views of home state senators, recording their stated reasons for supporting or opposing the nominee, and noting the dates on which senators were contacted by and responded to the committee became routine in 1913 at the start of the 63rd Congress. On the

left-hand side of each page of the docket book, the committee clerk pasted in a typed copy of the *Senate Executive Session Journal* notice that a nominee for a federal judgeship had been referred to the committee. The docket also shows the appointment of a subcommittee to review the nomination. On the right side of each docket page (see Figure 1), another pre-typed form is pasted into the book with space left for indicating the dates on which home state senators were consulted ("Inquiry addressed to each Senator from State whence person nominated"), the attorney general was contacted ("Papers and information requested of Attorney General"), the committee and chamber acted, and the home state senators responded. The docket also records the reactions of the senators to the nominee.

Examination of the complete series of docket books reveals that the process of consulting with home state senators (regardless of party) and documenting the dates and content of their responses was formalized in 1913. Starting in the late 1890s, the docket books note periodically that the home state senators had been contacted regarding a nomination; however, senators' views and responses were not uniformly solicited and documented until 1913. Because the committee regularly solicited the views of the Attorney General before that date (and recorded such action in its docket book), it is unlikely that regular reporting of senators' blue slip responses in 1913 was simply an artifact of better recording keeping by a new and more fastidious clerk. Before 1913, the clerks were already recording the transmittal of papers between the Attorney General and the committee.

26. Under S. Res. 464 (96th Cong.), Senate committees have the authority to restrict access to records of individuals for fifty years. As a result, the nomination files for every nominee referred to the Senate Judiciary Committee between 1956 and the present are sealed by order of the Judiciary Committee.

27. Based on the nomination files, Mitchell Sollenberger dates the origins of the blue slip to 1917 ("The History of the Blue Slip in the Senate Committee on the Judiciary, 1917–Present," *CRS Report for Congress*, RL32013 [2003]).

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY.

March 9, 1917.

Sir:

Will you kindly give me, for the use of the Committee, your opinion and information concerning the nomination of George W. Jack, of Shreveport, Louisiana, to be United States district judge, western district of Louisiana, vice Aleck Boarman, deceased.

Respectfully,

Charles Culberson
Chairman.

Hon. ROBERT F. BROUSSARD.

Senate.

REPLY:

The
March 10, 1917.
The appointment of Mr. George W. Jack as U. S. Dist. Judge for the Western District of Louisiana is entirely satisfactory. An early favorable report will be greatly appreciated.
R. F. Broussard

Fig. 2. First surviving senate blue slip, 65th congress (1917).

The blue slips recovered from the 65th Congress nomination files provide a glimpse of the likely format of the 63rd Congress blue slips (see Figure 2).²⁸ The appointee was George W. Jack, nominated by President Woodrow Wilson on 8 March 1917 to fill a vacancy on the Federal District Court for Western Louisiana. Soliciting the views of the two Democratic senators from Louisiana, Robert

Broussard and Joseph Ransdell, the committee sent each of the home state senators a blue slip signed by the panel chair, Charles Culberson (D-TX), on 9 March 1917. The preprinted form (with blank space left for the committee clerk to type the name, judgeship, and vice for the vacancy) asked "will you kindly give me, for the use of the Committee, your opinion and information concerning the nomination of..." Both senators returned positive endorsements on 10 March. "The appointment of George W. Jack," Broussard noted for the committee, "is entirely satisfactory. An early favorable report will be greatly appreciated."²⁹ The committee swiftly heeded the request,

28. According to Sollenberger, the format of the blue slip remained unchanged between 1917 and 1922. At that time, a deadline (seven days from a senator's receipt of the blue slip) was added for senators to return the blue slip. In addition, because Charles Culberson (D-TX) chaired the committee in the 63rd, 64th, and 65th Congresses, one can infer that the blue slips from the 65th (Figure 2, above) closely resemble those used in the 63rd. By no later than the 65th Congress, the slips were printed on blue stock, thus earning the "blue slip" handle.

29. Blue Slip, George W. Jack Nomination Folder, 65th Cong., NARA: SJC.

reporting Jack's nomination favorably on 14 March, with Senate confirmation following two days later.

WHY 1913?

Early twentieth century political events also point to 1913 as the critical year for this significant new policy approach. It was a pivotal year for the Democratic Party, having won back control of the White House in 1912 in a three-way race against Old Guard Republican William Taft and Bull Moose Teddy Roosevelt and control of the Senate. With Democrats winning the House, Senate, and White House in the 1912 elections, 1913 marked the first year of unified Democratic control of government since 1895. A full slate of progressive issues topped the Democrats' agenda after eighteen years of Republican rule, including reform of the tariff, currency, and antitrust laws. Progressives also took aim at the federal courts, after the Republican Party's successful transformation of the federal courts over the previous five decades into a bastion of conservative economic nationalism.³⁰

Given the electoral context of unified party control, I can safely reject the two potential accounts that mark the blue slip as a product of interparty competition during a period of divided party government. The blue slip does not appear to have been created by a majority party intent on undermining an opposition White House's control of judicial selection. Although the blue slip today provides the opposition party with a tool for diluting the president's influence over the selection of nominees for federal bench, such partisan intentions could not have motivated Wilson's Democratic majority when they took office in 1913. Nor does it appear that the blue slip was an invention of an opposition party seeking to prepare for its parliamentary future once it lost control of the Senate. To be sure, the Senate Democratic majority was slim after the 1912 elections—holding fifty-one of the chamber's ninety-six seats; however, an account predicated on interparty competition leading a tenuous majority to make plans for its future parliamentary needs is not a good fit for an innovation created in a period of unified control.

Given the appearance of the blue slip in a period of unified government, one must examine the fit of the two accounts in which institutional innovation is not predicated on competitive party pressures. To this end, I consider first the account that suggests intraparty divisions may have motivated factions to institutionalize home state senators' role in the

confirmation process, and then turn to the final account predicated on leaders' desire to reduce uncertainty about outcomes when the Senate went into executive session to consider confirmation of the president's judicial appointments.

WILSON AND DEMOCRATIC FACTIONS

Could intraparty competition over the makeup of the judiciary help account for the origins of the blue slip in 1913? There are quite a few reasons to be suspicious of such an account. First, and most importantly, numerous developments in 1913 signaled Senate Democrats' willingness to coalesce behind Wilson. The new president was aggressive in setting the agenda, using his Constitutional power to call Congress immediately into special session after his inauguration in 1913. The Senate Democratic Caucus that year returned to its occasional practice of designating binding caucus votes upon a two-thirds vote of the Caucus, and Democrats for the first time, in 1913, designated their new caucus leader, John Kern (D-IN), as the *majority* leader and created a party whip position.³¹ Given the electoral imperative of holding the Democratic Party together and expanding its base in anticipation of the presidential election in 1916, we might expect Democrats to limit institutional innovations that intentionally diluted presidential control of the agenda.³² Nor would we expect Democrats in such a context to extend the blue slip—and thus a potential veto power—to the minority party in that year.

Second, had Wilson paid little attention to the courts, we might have seen Senate Democrats move to increase their leverage over appointments—knowing that the president would acquiesce to a stronger Senate role in filling vacant judgeships. Wilson, however, appears to have recognized and cared about the potential policy consequences of his appointment power.³³ Unlike Taft, Wilson encouraged his advisors to view federal judgeships as a means of advancing his policy agenda. He directed his attorney general to scrutinize the policy views of potential judges with an eye to their progressive credentials, to the point that senators' choices were occasionally rejected. Recognizing the federal courts' entrenched economic conservatism, facing the first opportunity

31. On the 1913 Senate reforms, see Gerald Gamm and Steven S. Smith, "Policy Leadership and the Development of the Modern Senate," in *Party, Process, and Political Change in Congress*, ed. David W. Brady and Mathew D. McCubbins (Palo Alto, CA: Stanford University Press, 2002); and Walter Oleszek, "John Worth Kern: Portrait of a Floor Leader," in *First Among Equals: Outstanding Senate Leaders of the Twentieth Century*, ed. Richard A. Baker and Roger H. Davidson (Washington, DC: Congressional Quarterly, 1991).

32. See Scott C. James, *Presidents, Parties, and the State* (Cambridge: Cambridge University Press, 2000).

33. On Wilson's approach to filling the federal courts, see Ross, *Muted Fury*, and Solomon, "Politics of Appointment."

30. See William Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (Princeton, NJ: Princeton University Press, 1994); and Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891," *American Political Science Review* 96 (2002): 511–24.

in eighteen years to select federal judges, and understanding the president's intention to use the courts to advance and protect progressive goals, it seems unlikely that Democrats would have rewritten confirmation practices with the intention of diluting the president's appointment power.

It is worth noting in this context, however, that the Judiciary Committee from which the blue slip emerged was hardly a microcosm of the Senate Democratic Caucus in 1913. Under Culberson, the Senate Judiciary Committee was home to ten Democrats, including seven Dixiecrats.³⁴ Given that the Judiciary Committee was the locus of fights over revisions to federal antitrust and currency reform in the 63rd Congress, policy differences between Wilson and the panel's Democrats might have led Democrats to seek a way to increase their leverage over the appointment of new federal judges to federal courts in the South.³⁵ By creating a committee process for registering objections to nominees, the committee's southern Democrats might have calculated that use of the blue slip would effectively preserved the local and regional biases exhibited by federal courts in the South.

That said, though he was by southerner by birth, scholars disagree on the extent of Wilson's differences with the South.³⁶ Even on the highly salient issue of antitrust reform, Wilson and Judiciary Committee Democrats from the South were largely in agreement throughout 1913 on potential revisions to the Sherman Act. Rather, it was not until spring 1914 that Wilson essentially turned on agrarian Democrats by moving toward the progressives' proposal of creating a federal trade commission.³⁷ This timeline suggests that differences over public policy issues were unlikely to have motivated Judiciary Committee Democrats in 1913 to create the blue slip as a means of protecting southern federal judgeships from the White House's progressive interests.

34. On committee membership, see David Canon, Garrison Nelson, and Charles Stewart, "Historical Congressional Standing Committees, 1st to 79th Congresses, 1789–1947," Senate/63rd Congress, http://web.mit.edu/17.251/www/data_page.html (accessed 9 Nov. 2006). Augustus Bacon (D-GA) died in office, and was replaced on the committee by fellow Georgia Democrat, Hoke Smith. Note also that the that the Judiciary Committee's Dixiecrat bias was more than a simple reflection of the prevailing ratios on Senate committees. In fact, 60 percent of Appropriations Democrats hailed from the south, while only 35 percent of Finance Committee Democrats came from the south. Moreover, only 45 percent of 63rd Congress Democrats were from the deep south (plus Tennessee).

35. See James, *Presidents, Parties, and the State*.

36. On Wilson's relations with southern legislators, see C. Vann Woodward, *Origins of the New South, 1877–1913* (Baton Rouge: Louisiana State University Press, 1951); Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877–1917* (Chicago: University of Chicago Press, 1999) and James, *Presidents, Parties, and the State*.

37. See James, *Presidents, Parties, and the State*, 185–87.

MANAGING SENATE UNCERTAINTY

Could Democrats in 1913 have invented the blue slip as a means of reducing uncertainty about the fate of their president's judicial nominees? Again, there is little solid evidence available against which one could test this account and draw definitive conclusions. We do, however, have several pieces of evidence that are strongly consistent with that institutional account.

First, as suggested above, the uncertainty account fits best in a period of unified party control. Under such conditions, the Judiciary Committee chair would have had an incentive to facilitate confirmation of the president's nominees. Second, under the uncertainty model, one would expect that the blue slip would have been extended to both majority and minority party senators. If the goal in creating the blue slip was to provide a clear record of the home state senators' views on pending nominees, then it makes sense that the majority party would have wanted to cull such information from minority party senators as well. While the president was unlikely to have consulted with opposition party senators in selecting lower court nominees, the lack of a cloture rule on which the majority party rely for suppressing minority party opposition leads us to conclude that routine solicitation of home state senators' views would have served the majority's goals quite well. Moreover, the threat of obstruction was real, as Republican leaders in the previous Congress saw Democrats repeatedly block appointments of outgoing President William Taft.³⁸

Third, several institutional innovations by Senate Democrats in the 63rd Congress suggest that the new Democratic majority was struggling to increase control over the flow of business on the Senate floor—precursors, of course, to the adoption of cloture in the 65th Congress (1917–1919). These innovations collectively suggest that the newly empowered Democrats were concerned about their ability to maintain partisan solidarity as they steered Wilson's legislative priorities through the Senate.

One of these innovations was the formal election of a Democratic floor leader in 1913. Although, as early as 1890, Democrats had been selecting a Democratic Caucus chair—a colleague who was expected to lead the caucus and, by extension, serve as the party's chamber leader; however, with his election to the position in 1913, John Kern became the first Senate leader who was consistently referred to as the Democrat's "majority leader."³⁹ While this change surely

38. See Franklin Burdette, *Filibustering in the Senate* (Princeton, NJ: Princeton University Press, 1940), chap. 4.

39. See Gerald Gamm and Steven S. Smith, "The Rise of Floor Leaders in the United States Senate, 1890–1915," paper presented at the Conference on Party Effects in the U.S. Senate, Duke University, 7–8 Apr. 2006.

reflects a gradual transformation of the office of the party leader, Democrats appear to have had stronger expectations for Kern as the first Democratic leader in a period of unified Democratic control after nearly twenty years.

In addition to consolidating their expectations about their floor leader, Democrats in 1913 also created the new office of party whip, formally electing J. Hamilton Lewis (D-IL) as the “assistant” to majority leader Kern.⁴⁰ According to contemporary accounts, the whip’s office was created by the Democratic Caucus “as a further precaution against a snap division in the Senate by which the Democrats might find themselves in the minority. . . . Mr. Lewis’s chief duty will be to see that Democrats are present or paired at every roll call.”⁴¹ It was reported at the time that Democrats invented the whip office out of a “general dissatisfaction with Mr. Kern’s leadership.”⁴² Whatever the reason, it seems clear that Senate Democrats were experimenting with new methods for managing the president’s policy agenda while attempting to eliminate costly surprises on the chamber floor.

A third institutional innovation in the 63rd Congress also suggests the majority party’s effort to reduce uncertainty about control of the floor agenda. Although unanimous consent agreements (UCAs) had become a regular feature of how the Senate managed the floor agenda before 1914, several modern features of UCAs had not yet been adopted—allowing confusion to reign on the Senate floor over the modification and enforcement of these time agreements.⁴³ In January 1913, the conflict resulting from contradictory precedents over adoption and enforcement of UCAs reached its climax, leading a Senate committee to recommend formal revision of the UCA practice in 1914. With that innovation, UCAs were elevated to the status of formal orders, which transformed UCAs into predictable and reliable tool for leaders seeking to reduce uncertainties in offering of amendments and timing floor votes.

40. See Donald Ritchie, ed., *Minutes of the U.S. Senate Democratic Conference: 1903–1964*. (Washington, DC: U.S. Government Printing Office, 1998), 79.

41. “Democrats Agree to Lobby Inquiry,” *New York Times*, 29 May 1913, 1.

42. *Ibid.*

43. See Jason Roberts and Steven S. Smith, “The Evolution of Agenda-Setting Institutions in Congress: Path Dependency in House and Senate Institutional Development,” in *Process, Party, and Policy Making: New Advances in the Study of the History of Congress*, ed. David W. Brady and Mathew D. McCubbins, (Palo Alto, CA: Stanford University Press, forthcoming). A UCA sets the parameters for floor debate and schedules floor votes for legislative measures and nominations on the Senate floor. Given the lack of a majority cloture rule (or, before 1917, any cloture rule), unanimous consent of all senators was required to set the parameters of floor debate and to schedule votes.

Innovations in Democratic leadership and in the treatment of UCAs in 1913 and 1914 collectively suggest that inherited leadership and floor management practices were proving insufficient to advance and secure the Democratic agenda—even under the most auspicious conditions of unified Democratic control. Improving the flow of information about senators’ views of pending nominees by creating a blue slip and offering it to both majority and minority party senators would have been entirely consistent with the general tenor of institutional innovations occurring in the 63rd Congress. Moreover, given the relative ease of filibustering before adoption of the Senate cloture rule in 1917, Democrats might not have thought they were relinquishing much power to the minority in exchange for gaining critical information. The cost of the blue slip to the majority probably increased after the adoption of the cloture rule, as the opposition party found itself with a quasi-veto even after the cloture rule had limited the ability of very small groups of senators to obstruct the majority.⁴⁴

Although I lack definitive evidence to tie the blue slip’s creation conclusively to Democrats’ interest in reducing uncertainty, the timing of the blue slip innovation certainly seems consistent with the Democrats’ institutional imperatives upon regaining control of the Senate in 1913. Indeed, adoption of the blue slip fits neatly with other accounts of the transformation of Congress at the turn of the century as workloads burgeoned and organizations more generally became professionalized and institutionalized.⁴⁵ Moreover the demand for innovation to guide the new president’s agenda through the Senate was unique to 1913; by 1917, though still enjoying unified control, Democrats’ electoral incentive to manage the party’s agenda would have lessened.

One final consideration about the initial use of the blue slip provides even stronger corroboration that the practice was likely intended to reduce uncertainty about confirmation prospects for the president’s nominees. According to one careful study of the nomination files kept by the Senate Judiciary Committee, no Judiciary panel chair allowed an objection from a home state senator (a “negative” blue slip) to automatically block a nomination in committee before 1956. It was not until James Eastland took the helm of the panel in 1956 that negative blue

44. In this context, adoption of the blue slip offers a prime example of institutional development resulting from layers of reforms. On this, see Eric Schickler, *Disjointed Pluralism* (Princeton, NJ: Princeton University Press, 2001).

45. See Nelson W. Polsby, “The Institutionalization of the House of Representatives,” *American Political Science Review* 62 (1968): 144–68; Gregory Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate* (Princeton, NJ: Princeton University Press, 2006); and Eric Rauchway, “The Transformation of the Congressional Experience,” in *The American Congress*, ed. Julian E. Zelizer (Boston: Houghton Mifflin Co., 2004).

slips came to be treated as an absolute veto—a practice that Edward Kennedy (D-MA) tempered upon becoming chair of the committee in 1979.

Before 1956, Senate Judiciary Committee records and the *Senate Executive Session Journal* indicate that negative blue slips were treated as *advisory* to the committee and the full chamber, rather than as a single-handed committee veto exercised by a home state senator. To understand how a negative blue slip could be “advisory,” it is helpful to examine the fate of the first nominee apparently subject to a negative blue slip. Within weeks of the opening of the first session of the 65th Congress (1917–1919), committee chair Charles Culberson received a negative blue slip from Thomas Hardwick (D-GA) for the nomination of U. V. Whipple for a Federal district judgeship in southern Georgia (see Figure 3). The committee subsequently reported the nomination “adversely” to the full Senate, which proceeded to refuse to provide its advice and consent.⁴⁶ In short, a negative blue slip provided information to the chair about the potential for strong floor opposition should the nominee be reported favorably from the Judiciary Committee. Given the practice of senatorial courtesy, the home state senator of the president’s party could have expected his colleagues to vote down the nominee had he been reported unfavorably from committee.

Nor was this an isolated incident. Three months later, Wilson submitted a new nominee, W. E. Thomas, for the same vacant judgeship. In this case, both home state senators returned the same negative blue slip, stating their simple opposition to confirmation (see Figure 4). Once again, rather than be treated as an absolute committee veto, the two negative blue slips appear to have led the committee to report the nominee adversely—a signal received by the full chamber, which rejected the nomination later that day. One month later, Wilson tried again, this time selecting a nominee who proved acceptable to the two home state senators.⁴⁷

Objections registered on blue slips appear to have had high informational value for the committee chair, allowing him to anticipate and, most importantly, avoid opposition on the Senate floor to the president’s favored nominees. Lacking the power of a cloture rule to bring a contested nomination to a vote, party leaders certainly would have viewed a system for detecting opposition to nominees before the floor stage as a valuable improvement. As such, the original blue slip, seems to have been devised as

an “early warning system,” not an absolute veto. That helps to explain, of course, why senators might have been willing to allow opposition party senators to fill out blue slips. Democrats did not believe they were handing over a committee veto to the minority party; rather, they likely believed they were improving their ability to manage the floor and to reduce uncertainty about upcoming floor action. Finally, the chair of the committee, Charles Culberson, had earlier served a term (1907–1909) as chair of the Senate Democratic Caucus—effectively making him the party’s leader. Altering panel practices to improve floor management would have been a natural instinct for a recent party leader. Moreover, the Judiciary Committee used blue slips for many of the other appointments that came through the Judiciary Committee, including U.S. attorney and marshal nominations. Culling information about senators’ views of these additional appointments would also have bolstered the chair’s ability to forecast floor outcomes during the committee’s consideration of the nominees. Senators’ intentions in devising the blue slip, in short, bear a strong resemblance to the motivations underlying other institutional reforms in the 63rd Congress.

DISCUSSION

The transformation of the blue slip from an advisory tool to a potential confirmation veto of the other party’s nominees has some strong implications for how we build theories of institutional choice and change. Where do institutions come from, and why and when do they evolve? One prominent approach to answering such questions entails what Paul Pierson pointedly terms “actor-centered functionalism”: explanations of institutional choice are made through “reference to the benefits these actors expect to derive from particular institutional designs.”⁴⁸ If an institution secures a particular basket of benefits, scholars often reason that the institution must have been created to provide those benefits for the actors who created the institution.

Theoretical accounts of legislative organization in the U.S. Congress provide a ready example. If the establishment of congressional committees with distinct and fixed jurisdictions fosters gains from trade across committees, then the committee system likely was designed to secure those gains from trade.⁴⁹ And if the original committees were not structured to capture gains from trade, it is assumed that they evolved in that manner as legislators continued their efforts to capture the gains from trade across committees. As in the case of committees, the

46. *Senate Executive Journal*, 65th Cong., 1st Sess., 24 Apr. 1917.

47. Hardwick dutifully returned a blue slip with his positive endorsement. Smith again did not appear to return his blue slip, leading the committee to note on the transmittal paper for the nomination that the nomination of Beverly Evans was “authorized to be reported favorably by Senator Fletcher . . . in case word comes from Senator Smith of Georgia that he has no objection” (see Beverly D. Evans Nomination Folder, NARA: SJC).

48. Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton, NJ: Princeton University Press, 2004), 104.

49. Barry R. Weingast and William Marshall, “The Industrial Organization of Congress,” *Journal of Political Economy* 96 (1988): 132–63.

UNITED STATES SENATE
 COMMITTEE ON THE JUDICIARY.

April 9, 1917.

Sir,

Will you kindly give me, for the use of the Committee, your opinion and information concerning the nomination of

U. V. Whipple of Cordale, Georgia, to be United States district judge for the southern district of Georgia, vice William Wallace Lambdin, deceased.

Respectfully,

W. C. Culler
 Chairman.

Hon. THOMAS W. HARDWICK,

U. S. Senate.

REPLY:

April 11, 1917.

Replying to above I beg to say that I object to this appointment - the same is personally offensive and objectionable to me, and I can not consent to the confirmation of the nominee.

Hon. C. A. Culbertson, Chairman,
 The Committee on the Judiciary, U.S. Senate

Very truly yours,

Thomas W. Hardwick,

Fig. 3. First negative blue slip (1917).

benefits secured by institutional arrangements are typically collective in character. As Barry Weingast has observed, "appropriately configured institutions restructure incentives so that individuals have an incentive to cooperate. . . . The essence of institutions is to enforce mutually beneficial exchange and cooperation."⁵⁰

50. Barry R. Weingast, "Rational Choice Institutionalism," in *Political Science: The State of the Discipline*, ed. Ira Katznelson and Helen V. Milner (New York: Norton, 2002), 670.

Despite the prominence of economic modes of thinking about institutional choice, there are many reasons to doubt the easy fit of such an account to episodes of institutional choice. As Paul Pierson's critique suggests, unanticipated consequences, changes in the social environment of an institution, and forces that promote institutional resilience as well as change may intervene over the course of an institution's development. Such dynamics should limit our confidence in accounts that reason backward from contemporary effects of an institution to

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UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

July 11, 1917.

Sir:

Will you kindly give me, for the use of the Committee, your opinion and information concerning the nomination of W. S. Thomas, of Valdosta, Georgia, to be United States district judge, southern district of Georgia, vice William Wallace Lambdin, deceased.

Respectfully,

W. S. Harrison
Chairman.

Hon. HOKE SMITH,

U. S. Senate.

REPLY:

July 12, 1917.

I am opposed to Confirmation
Hoke Smith
I am opposed to Confirmation
Thos W. Hardwick

Fig. 4. Second negative blue slip.

rational motivations for the institution's selection. Rational calculation certainly might be at work; however, snapshots of institutional choice, Pierson suggests, could generate incomplete and potentially misleading accounts of institutional design.

An alternative account recognizes that institutions, once adopted, tend not to be fixed in stone. As Edward Sait observed, "Institutions rise out of experience... A borrowed institution will change in

character to the extent that the new environment differs from the old."⁵¹ Institutions inherited from the past can come to have new consequences once the political environment shifts. Moreover, new practice can interact with existing rules and, over time,

51. Edward Sait, *Political Institutions: A Preface* (New York: Appleton-Century, 1938), 529.

come to change the use and impact of both. In other words, although the current blue slip process is often exploited to undercut the influence of the president's partisans in selecting new judges, such use of the blue slip appears not to have been obvious to the social actors who created it. Exploitation of the blue slip by the president's foes appears to have emerged only as senators began to innovate with old practices under new circumstances. That is, key institutional consequences of the blue slip do not appear to have been anticipated, and thus could not have driven the adoption of the practice. Answers to the question "where do institutions come from?", in other words, require us to explore the path along which an institution has evolved.⁵²

CONCLUSION

Nothing in the language of the blue slip requires the chair of the Judiciary Committee to heed the views of home state senators when they object to nominees slated for judgeships in their state. Yet, by most accounts, the chair has historically respected objections from home state senators of either party, allowing negative blue slips to lead the committee to recommend against confirmation or allowing a single negative blue slip to block further consideration of a nominee.⁵³ Indeed, we can see the impact of such deference in patterns of nomination and confirmation delay over the latter half of the twentieth century: ideological foes of the president have used the blue slip threat to systematically slow down the selection and confirmation of judicial nominees they oppose.⁵⁴ Such deference to the home state senator persists, according to Lewis Froman, because "legislators are, in effect, socialized into rules which specify that one must not jeopardize his ability to play future games by seriously discombobulating

other members."⁵⁵ To be sure, senators' willingness to abide by the rules is also rationale, as they each expect to benefit from the norm in the future.⁵⁶

Classic and recent treatments of senatorial courtesy strongly suggest that deference to home state senators serves the individual interests of senators and the collective interest of the Senate. Because senators are better off with practices such as the blue slip than without it, the practice is maintained by all. However true this may be about the contemporary functioning of the chamber, it falls short as a basis for explaining the development of the practice. Because the effects of the new practice were unlikely to have been anticipated or desired when the blue slip was adopted in 1913, it is doubtful that the players involved selected the new institutional practice in anticipation of the effects of the new procedure. In this respect, Pierson's warnings regarding the limits of functionalist accounts—even those based on expectations of rational behavior—ring true. We are unlikely to be able to reason backwards from consequences to intentions to discern the origins of institutional arrangements.

Although Democrats would occasionally find themselves at odds with President Wilson, who was eager to use his appointment power to place progressives on the bench no matter the views of home state senators, such internal party competition seems not to have motivated the construction of the blue slip in 1913. Instead, the transformation of the blue slip from advisory tool to potential veto power was a striking, yet unintended, consequence. Why and how the blue slip (as an informal practice) took root and became tantamount to a veto, of course, remains to be explained. It would appear from the origins of the blue slip, however, that institutional development occurs as social actors, constrained by the weight of inherited practice, innovate at the margins in pursuit of their short-term goals—often with unanticipated, but no less consequential, results.

52. See also Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan* (New York: Cambridge University Press, 2004).

53. With the rising salience of judicial nominations to party agendas, respect for the norm might be eroding. In 2003, the Senate Judiciary Committee chair went ahead with a judicial nomination hearing on a 6th Circuit nominee even though two negative blue slips had been returned by the Michigan senators. See Jennifer Dlouhy, "Blue Slip or Not, Hatch Holds Judiciary Panel Hearing on Bush Court Nominee," *CQ Today*, 30 Jul. 2003. For a broader assessment of the blocking power of home state senators, see David Primo, Sarah A. Binder, and Forrest Maltzman, "Who Consents? A Theoretical and Empirical Examination of Pivotal Senators in Judicial Selection," (unpublished ms., 2006, <http://www.rochester.edu/college/psc/primo/pbmpivotal.pdf> (accessed January 19, 2007)).

54. See Binder and Maltzman, "Limits of Senatorial Courtesy," and "Senatorial Delay."

55. Froman, "Organization Theory," 523.

56. Tamar Jacobi, "The Senatorial Courtesy Game: Explaining the Norm of Informal Vetoes in Advice and Consent Nominations," *Legislative Studies Quarterly* 30 (2005): 193–217.

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