

Republican Blue Slip Obstructionism: Packing the Courts with Radical Conservative Judges

Case Study: Republican Obstruction, Obama Administration to Trump Administration

Throughout President Obama's time in office Republican senators abused what is referred to as the blue slip process to prevent his administration from filling more than 100 federal judicial seats. Republicans' reason for refusing to perform one of the Senate's most important tasks? Political leverage and the hope that they could put the job off long enough for their party to fill the seats with nominees of their choosing—based on ideology. President Trump let Senate Republicans do just that, following the lead of the Federalist Society and other far-right groups to pack our courts with extreme right-wing jurists. The Democratic Caucus must not let history repeat itself during the Biden administration.

Background

The blue slip tradition is an informal Senate Judiciary Committee (SJC) process that gives home-state senators the opportunity to signal their approval or disapproval of judicial nominees to seats in their states by filling out and returning a blue slip of paper to the Committee Chair. The 65th Congress (1917-1918) initiated the practice as a way to incentivize the White House to collaborate with home-state senators on judicial nominations. But over the last 15 years, Republicans have weaponized the blue slip process, transforming it from a means of promoting collaboration to a tool of obstruction. Now, Republicans systematically use the blue-slip process to block highly qualified, diverse, and fair-minded nominees from becoming federal judges.

When Senator Grassley and his Republican colleagues gained power during the Obama administration, they immediately began using the blue slip process to block President Obama's nominees. Of the 17 nominees Republicans blocked, 10 were women and 10 were African American.

Altogether, conservatives used blue-slip obstructionism and other undemocratic tactics to stall the nomination or confirmation of more than 100 judicial nominees during the Obama administration.

After keeping these seats open for years to the detriment of not just the diversity but the function of the overburdened federal judiciary, these Republicans jumped to help the Trump administration fill the vacancies—and quickly—with historically unqualified, overwhelmingly white and male nominees with extremist right-wing agendas. The long-term effects of blue slip obstructionism: Radical judges, chosen as much for their age as their politics, who will spend a lifetime issuing extremist decisions out of step with U.S. law and Americans' beliefs. This brief focuses on the Trump administration nominees who would never have become judges were it not Republican Senators' abuse of the now-outdated blue slip process.

Blue slip obstructionism during the Obama administration proved that Senate Republicans willing to disregard norms, rules, and procedures to achieve their aim of politicizing the judiciary. These destructive tactics, which come at the people's expense, can no longer be tolerated. As of this writing, there are over 100 vacancies across the federal judiciary that must be filled by the Biden administration.

Extreme Trump Nominees Filled Seats Held Open via Blue Slip

Republican obstructionism via blue slip during the Obama administration allowed President Trump to nominate deeply problematic jurists whose decisions continue to harm Americans to this day. Here are a few examples of extremist conservative Trump judges, confirmed to a seat held open through blue slip obstructionism:

Judge Michael B. Brennan ([Seventh Circuit](#))

Judge Brennan occupies a Seventh Circuit seat President Obama tried to fill twice during his presidency. Obama nominated Victoria Nourse, a former counsel for the U.S. Senate Judiciary Committee recommended by Senator Russ Feingold (D-WI). After defeating Senator Feingold in the 2010 midterm elections, newly elected Senator Ron Johnson (R-WI) blocked Nourse's nomination via the blue slip process. Nourse was not renominated. Obama then nominated Donald Karl Schott, who was approved by the Judiciary Committee but never received a vote on the floor—again due to blue slip issues.

The Trump administration nominee Judge Michael Brennan was confirmed to what should have been Nourse's or Schott's seat in 2018, despite Senator Tammy Baldwin's (D-IL) negative blue slip for the nominee. Why? SJC Chairman Grassley unilaterally decided he would only honor the blue slip process for district court nominees. The hypocrisy is palpable: Only because Republicans abused the blue slip process was there a seat to which to confirm Judge Brennan.

Judge Brennan has consistently ruled as an extremist conservative.

- In ***Miller v. Smith***, a Seventh Circuit panel that included Judge Brennan sided with an Illinois couple who wanted to keep a loaded gun while providing in-home day care services. The couple challenged the Illinois Department of Children and Family Services policy that required that any firearm kept in a foster home or home day care center must be kept unloaded and disassembled and that care providers must alert their clients that guns are being kept on the property.
- In ***Doe v. Rokita***, a Seventh Circuit panel that included Judge Brennan rejected a First Amendment challenge to an Indiana law requiring abortion providers to dispose of fetal remains by burial or cremation or to place the burden on parents to do so.

Justice Amy Coney Barrett (Seventh Circuit, Supreme Court)

Before Amy Coney Barrett became Justice Barrett, then President Trump appointed her to a Seventh Circuit seat that was, as above, only vacant because of Republicans' abuse of the blue slip process. President Obama originally nominated Judge Myra C. Selby, the first Black American and the first woman appointed to the Indiana Supreme Court, to the seat. After Republican Senator Dan Coats refused to return his blue slip, her nomination stalled, leaving the seat to be filled in 2017 by Trump administration's nominee Amy Coney Barrett, who joined the Supreme Court a few short years later following the death of Justice Ruth Bader Ginsburg.

In her brief tenure on the Seventh Circuit, Justice Barrett managed to undermine reproductive rights, racial justice, workers' rights, and immigrants' rights.

- In ***Planned Parenthood of Indiana and Kentucky v. Box***, Barrett dissented, criticizing the panel's decision to enjoin an Indiana law forcing minors to inform their parents before terminating a pregnancy despite precedent providing avenues of judicial bypass procedures, which protect minors who must seek abortion care confidentially.
- Similarly, in ***Planned Parenthood of Indiana and Kentucky v. Commissioner of Indiana Department of Health***, Barrett joined a dissent arguing that a state should be able to restrict abortion based on why a person seeks the procedure.
- In ***EEOC v. Autozone***, Barrett joined a majority of the Seventh Circuit in refusing a request to rehear a three-judge panel decision upholding deliberate workplace racial segregation.
- In ***Kleber v. CareFusion Corp.***, Barrett joined a ruling holding that job applicants, as opposed to employees, cannot claim that an employer's hiring practices have a discriminatory impact on older workers.

Judge Thomas Lee Kirsch (Seventh Circuit)

Thomas Lee Kirsch was appointed by the Trump administration to replace Justice Barrett on the Seventh Circuit after she was elevated to the Supreme Court. Judge Kirsch routinely advances conservative political ideologies, undermining key civil rights protections.

- In ***Demkovich v. St. Andrew the Apostle Parish***, Judge Kirsch joined a majority opinion holding all religious organizations are immune from hostile work environment claims, meaning that organizations like churches cannot be sued for maintaining what would otherwise be an illegal working environment harming workers on the basis of sex, sexual orientation, disability, or other factors, leaning on the so-called ministerial exception.
- In ***United States v. Thomas Alt***, Judge Kirsch joined a majority opinion holding that the government's removal of the only African American prospective juror in a case did not violate the *Batson* rule, which bars attorneys from discriminatory challenges during jury selection. The *Batson* rule was developed to prevent racial bias in jury selection and ensure greater fairness for defendants who belong to racial minorities.
- In ***Runkel v. City of Springfield***, Judge Kirsch joined a majority opinion that held that a white city employee's reverse discrimination claim under Title VII could proceed, despite the district court's dismissal of the case. Conservatives have used "reverse-discrimination" arguments to perpetuate a false narrative that barring discrimination against marginalized communities is tantamount to discriminating against white people.

Judge Arthur Marvin Quattlebaum Jr. (District of South Carolina, Fourth Circuit)

President Obama nominated Judge Alison Lee, the first Black woman to be elected as state circuit judge in South Carolina, to a vacancy in the District Court of South Carolina. Senators Linsey Graham and Tim Scott refused to return blue slips, blocking her nomination. In 2016, the Obama administration tried a second time to fill the seat with another impressive candidate: Chief Justice Donald Beatty of the South Carolina Supreme Court, who was also racially diverse. South Carolina's Republican senators once again blocked the nomination. In 2018, the Trump administration nominated and Republicans confirmed a conservative white man, Arthur Marvin Quattlebaum Jr., instead.

Shortly thereafter President Trump elevated Judge Quattlebaum to the Fourth Circuit, where he continues to express extremist conservative views, with a penchant for issuing gratuitous, scathing dissents. He frequently seeks to shield Republican state legislators and corporate interests while actively weakening protections for members of minority communities and the environment.

- In *North Carolina State Conference of the NAACP v. Berger*, on rehearing of a panel decision by the full Fourth Circuit, Judge Quattlebaum joined two other Trump appointees in a harsh dissent arguing that the court should approve state Republican legislative leaders' intervention in a federal lawsuit brought by the NAACP to challenge a North Carolina voter identification law. The majority rejected the Trump judges' arguments and the district court decision was vacated.
- In *Naturaland Trust v Dakota Finance LLC*, Biden-nominated Judge Toby Heytens wrote a 2-1 decision that reversed a Trump district judge and authorized environmental groups to file suit under the Clean Water Act to challenge harmful pollution. Judge Quattlebaum dissented.
- In *Williams v. Kincaid*, the Fourth Circuit held that gender dysphoria is protected under the Americans with Disabilities Act (ADA), a victory for the transgender community. Judge Quattlebaum once again dissented, writing that the court had "judicially modified" the ADA and ignored what Congress intended by excluding "gender identity disorders."
- In *re: Willis Towers Watson Proxy Litigation*, Judge Quattlebaum dissented to argue that shareholders could not sue corporate officials for violations of the Federal Securities Act that resulted in "false or misleading" documents relating to a corporate merger. The majority reversed the dismissal of the case by the district court and sent the case back to that court so shareholders could pursue their claims.

Conclusion

Republicans in the Senate have abandoned the blue slip process as originally conceived. The stakes for reforming that process, ending obstructionism by returning to the blue slip procedure followed by the Senate Judiciary Committee when headed by then-Senator Biden, could not be higher.

The Trump administration and its legislative allies packed the federal judiciary with far-right judges. Not only did Republican senators use the blue slip to actively block highly qualified diverse candidates nominated by the Obama administration, they dangled the promise of collaboration to push the White House away from nominating progressive candidates. No more. Trump administration appointees have shown they will use their lifetime positions to undermine civil rights, immigrants' rights, environmental protections, reproductive justice, and economic justice.

The blue slip policy as currently practiced means more of the same. It's time for a change: We must take back our federal judiciary and the process by which its members are selected and confirmed before it's too late.