

## American University Washington College of Law

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From the Selected Works of Herman Schwartz

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### Right Wing Justice: The Conservative Campaign to Take Over the Courts (Excerpt pages 198-99)

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president's nominees. Cheryl Dinkins, another Republican Party activist, was appointed chairman of the ABA's judicial review committee in August 2002.

Democrats were more incensed over Hatch's announcement that the blue-slip system would no longer be honored so long as the White House "consulted" with both home-state senators. Hatch claimed to be following past practice, but his claim was belied by the language he himself added to the blue-slip form in 1998 that "no further proceedings will be scheduled until both blue slips have been returned by the nominee's home-state senators."<sup>6</sup>

A word about the blue-slip system. Although its origins are not entirely clear, it appears that it developed in the 1950s as what one student of the process calls "the institutionalization of 'senatorial courtesy.'" When a judicial nomination is made, the chair of the Senate Judiciary Committee sends "blue slips" (so called because of the color of the paper) to the senators of the nominee's home state. The practice has been that if even one senator declines to return the slip, then the nomination is dead, or at least that further action is unlikely, depending on what the chair decides to do. The blue-slip procedure is employed only by the Judiciary Committee and only for federal judges. Other nominees to any post, however, including judges, can be stopped by senators who put a "hold" on a nominee, or by chairs of committees who refuse to hold confirmation hearings. The Senate majority leader can also halt a nomination by refusing to schedule an up-or-down vote.<sup>7</sup>

Although the blue-slip system applied only to judicial nominees, the other blocking devices can be used against a nominee for any office that requires senatorial consent. All of these methods were used frequently by the Republicans to block Clinton nominees, with anonymity usually cloaking the senator who either withheld a blue slip or placed a hold on a nominee.

There is some research indicating that until recently, a refusal to return a blue slip was actually quite rare. The system is designed to give senators, even those of the other party, the ability to force the president to negotiate on the vacancy. In the past it was therefore used primarily to delay, but in recent years it has come to be used by senators from each party to kill a nomination. In 2001, when the Democrats took control of the Senate after Vermont Republican Jim Jeffords's change of party, the Republicans for the first time agreed to disclose who was using the blue slip, a reform Senator Kennedy had sought many years earlier. An effort to force disclosure of all floor "holds" has never succeeded, however, despite an agreement by Daschle and Lott in 1999 and further attempts in 2003.

The Democrats' concern about Hatch's modification of the blue-slip system was not lessened by what the White House considered "consultation." According to Gonzalez, he had met with the Judiciary Committee periodically since early February "to solicit their input, to get their advice, to ask for their help in getting the president's nominations," but even Hatch admitted that these meetings were little more than a "listening session," as New York Democrat Charles Schumer put it. Democratic Senator Dianne Feinstein commented that "consult" really amounted to "insult." Maryland Senators Paul Sarbanes and Barbara Mikulski received this treatment when discussing a possible Fourth Circuit nominee from Maryland, Peter D. Keisler, a leading member of the Federalist Society and a former law clerk to Robert Bork. During their half-hour meeting with Gonzalez, he never asked for their opinion but simply praised Keisler.<sup>8</sup>

By May, the Democrats were ready to fight, particularly over what were now five Fourth Circuit vacancies out of fifteen. Little was heard any more from Helms about too many judges. When Wilkinson was asked about his prior comments on the