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Senate Blue Slips and Senate Regular Order

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Justice Neil Gorsuch's Supreme Court confirmation process exacerbated the striking divisiveness, rampant partisanship, and stunning paybacks that have systematically plagued the federal judicial selection process. The Senate basically ended any true debate when the Republican majority peremptorily detonated the "nuclear option" for Supreme Court nominees. This measure, which the Senate implemented by a majority vote, limited filibusters regarding all judicial nominees, allowing a simple majority ballot to confirm a nominee. The requirement of sixty votes for cloture to end debate had supplied critical protection for the Senate minority, particular senators from states that experienced vacancies, and the constituents whom they represent.

One century-long practice that does remain is the "blue slip." Now that the Senate minority has very few protections, the blue slip acts as a crucial safeguard. Under Senate tradition, whenever the President submits a federal district or appeals court nominee, the Judiciary Committee Chair sends a blue slip of paper to each senator who represents the state in which the nominee will sit, and those senators can delay the nomination by refusing to return the slip. Blue slip retention comprises the major protection in the selection process for senators, especially those who are not in the chief executive's party. However, confusion attends the construct's application. Therefore, recent changes in the blue slip practice by Senate Judiciary Committee Chair Senator Chuck Grassley (R-IA), powerful support for Grassley's perspectives regarding slips from many Republican senators, and new threats by other Grand Old Party (GOP)

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members to abrogate or change blue slips merit scrutiny. Elimination or alteration could jeopardize the Senate's discharge of its constitutional responsibility to advise and consent on presidential nominees and undermine the institution itself.

Part I canvasses the rise and growth of blue slips, which primarily derive from the tradition of senatorial courtesy. Part II analyzes how the practice is currently employed. This Part reveals that blue slips safeguard the prerogatives in the selection process of home state politicians, especially those in the minority, and that Chairs have applied the concept rather similarly. The Part also discusses how numerous individuals and entities, outside and within the upper chamber, have urged the Republican majority to jettison or modify blue slips. However, their contentions are unclear. Moreover, new phenomena—specifically President Donald Trump's apparent view that venerable Senate procedures frustrate realization of his political objectives—could jeopardize blue slips. This pressure, which mounted substantially over 2017, apparently prompted Senator Grassley to alter blue slips. As Part III shows, that change is unfortunate because the measure's benefits outweigh its disadvantages, especially when hyper-partisanship pervades federal judicial selection. Thus, Part IV supplies recommendations for the future application of blue slips.

I. BLUE SLIP ORIGINS AND DEVELOPMENT

The origins and development of the blue slip warrant comparatively thorough assessment here. Comprehensive analysis elsewhere reveals that the blue slip's contours remain ambiguous, because the Judiciary Committee Chairs have not applied blue slip policy consistently and the practice remains unwritten.[1] Some observers argue that the idea enjoys a century-old pedigree and results from the Judiciary Committee's institutionalization of senatorial courtesy[2] and that the precise effect

1. *See*, *e.g.*, Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 77 (2001); Mitchel A. Sollenberger, *The Blue Slip: A Theory of Unified and Divided Government, 1979-2009*, 37 CONGRESS & PRESIDENCY 125, 130 (2010).

2. MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 143-45 (2000); Sarah A. Binder, *Where Do Institutions Come From?: Exploring the Origins of the Senate Blue Slip*, 21 STUDS. AM. POL. DEV. 1, 7-12 (2007).

granted blue slip delivery or retention has been left very much to the panel Chair's discretion.[3] Across a considerable portion of the blue slip's history, the mechanism provided "senators absolute power to determine the fate of their home-state judicial nominations," but more recently the committee's employment of slips has diluted senators' ability to completely "block any nominee."[4] All modern Chairs have expected that presidential administrations will vigorously consult with home state politicians before nominations and have frequently assigned more "value to a negative blue slip [properly marshaled] by a non-consulted home-state" politician.[5]

From slips' origination in the 1910s until 1955, most senators rarely considered them to be vetoes, perceiving the measure instead as a bargaining chip to encourage administration consultation or to attain closer panel investigation of nominees. Moreover, Chairs traditionally refused to "view a negative blue slip as a [means for curtailing] all action on judicial nominations."[6] However, when Senator James Eastland (D-MS)

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3. Betsy Palmer, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History*, CONG. RES. SERV. 8 (July 2, 2008), https://fas.org/sgp/crs/misc/RL31948.pdf [https://perma.cc/HCX2-TTKH]; Sollenberger, *supra* note 1, at 131.

4. Sollenberger, *supra* note 1, at 125. *Accord*, 163 CONG. REC. S7,207-08 (daily ed. Nov. 14, 2017) (statement of Sen. Lee) [hereinafter Lee Statement]; Sheldon Goldman et al., *Obama's First Term Judiciary: Picking Judges in the Minefield of Obstructionism*, 97 JUDICATURE 7, 17 (2013).

5. Mitchel A. Sollenberger, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, CONG. RES. SERV. 25 (Oct. 22, 2003), https://fas.org/sgp/crs/misc/RL32013.pdf [https://perma.cc/JC8X-FHFN]; *see* Denis Steven Rutkus, *The Role of Home State Senators in the Selection of Lower Federal Court Judges*, CONG. RES. SERV. 12 (Feb. 11, 2013), https://fas.org/sgp/crs/misc/RL34405.pdf [https://perma.cc/E3R4-LCCU]; Carl Hulse, *Lessons from a Failed Nomination, for Both Brett Kavanaugh and the Senate*, N.Y. TIMES (July 21, 2018), https://www.nytimes.com/2018/07/21/us/politics/ryan-bounds-nomination-senate.html [https://perma.cc/V5YC-FXKV].

6. Sollenberger, *supra* note 5, at 9; *see* Binder, *supra* note 2, at 11; Lee Statement, *supra* note 4.

served as Chair of the Judiciary Committee from 1956 to 1978, he implemented a policy that delayed nominees' consideration until both of the relevant state's senators produced slips.[7]

II. MODERN APPLICATION

Professor Mitchel Sollenberger posited that, while Eastland's 1978 retirement limited the use of blue slips as vetoes, contemporary practice depended on whether government was unified or divided.[8] When Senator Edward Kennedy (D-MA) assumed the chairmanship, he attempted to reform the blue slip process. Under Kennedy's leadership, if the slip were not returned within a reasonable time, the Chair would ask members whether they wished to proceed with a hearing, "rather than letting the nomination die," so that "[t]he committee, and ultimately the Senate, can work its will."[9] This approach engendered controversy and Republican opposition, mainly because Democrats controlled the presidency and the Senate, while passage of 1978 judgeships legislation created many seats to fill.[10] In the 1980 elections, Republicans won the presidency and the Senate, and Senator Strom Thurmond (R-SC) assumed the chairmanship.[11] Thurmond announced that the committee would mirror Kennedy's actions

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7. Binder, *supra* note 2, at 11-12; Palmer, *supra* note 3, at 9.

8. Sollenberger, *supra* note 1, at 131; *see* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 236-84 (1997).

9. *Selection and Confirmation of Federal Judges: Hearing Before the S. Comm. on the Judiciary*, Part I, 96th Cong. 4 (1979); *see* GOLDMAN, *supra* note 8, at 263, 283-84; Denning, *supra* note 1, at 77-79.

10. Denning, *supra* note 1, at 77-80; Pub. L. No. 95-486, 92 Stat. 1629 (1978) (adding a substantial number of appellate and district court judgeships); Elliot Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate's Role?*, 64 JUDICATURE 60, 73 (1980) (finding that senators had "rarely used" blue slips to halt nominees before 1980).

11. Sollenberger, *supra* note 1, at 133, *see* GOLDMAN, *supra* note 8, at 285-345.

by presuming candidates unobjectionable if home state senators did not contact the committee within seven days of receiving slips but warned that if one of the senators registered opposition, consideration of the nominee must halt.[12]

The 1986 Democratic recapture of the Senate marked the first period when government was divided after Eastland's retirement, and Senator Joe Biden (D-DE) ascended to the chairmanship.[13] Biden advised that a negative slip would constitute a major, albeit not controlling, factor if President George H.W. Bush had actively consulted applicable home state politicians, but the Chair admonished that the panel would honor the slip if President Bush failed to consult.[14]

Blue slip procedures remained fairly stable until several years after divided government reemerged with the GOP's 1994 midterm Senate capture and the chairmanship of Senator Orrin Hatch (R-UT).[15] In 1997,

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12. Sollenberger, *supra* note 1, at 133. He even held a hearing that was the "first reported instance since the 1950s" of processing a nominee with two negative slips. *Id.* at 134.

13. *Id.* at 135-36 (observing that "Biden strengthened blue slips" and panel scrutiny of lower court nominees during President Reagan's last two years); Sollenberger, *supra* note 5, at 13-14.

14. Sollenberger, *supra* note 5, at 13-14; Sollenberger, *supra* note 1, at 135. Blue slips provoked little controversy in President Bill Clinton's first two years when Democrats earned unified government for the first time since President Carter's tenure. *See* Robert A. Carp et al., *President Clinton's District Judges: "Extreme Liberals" or Just Plain Moderates?*, 84 JUDICATURE 282, 286-87 (2001) (explaining that President Clinton "was largely successful in obtaining approval of his judicial appointees" during the first two years of his administration); Sollenberger, *supra* note 1, at 136-37. Senator Biden remained as Chair and made no comprehensive, formal announcement which changed the procedures. Sollenberger, *supra* note 5, at 13-14.

15. Sollenberger, *supra* note 1, at 137; Sollenberger, *supra* note 5, at 14. Hatch first expressly informed President Clinton that he would demand what Biden had practiced in 1989—only stalling when the President failed to consult both home state politicians. Sollenberger, *supra* note 5, at 14-15; *see supra* note 14 and accompanying text.

Hatch articulated a more robust blue slip policy as his Republican colleagues were frustrated about securing less consultation from President Bill Clinton than they had expected.[16] In this period of acutely divided government, Hatch permitted one negative slip to be a veto mechanism.[17]

The blue slip issue became controversial again with President George W. Bush's contested 2000 election, due to uncertainty respecting the historical practice and the GOP's intentions about modifying the system.[18] Despite the claim by Hatch that he was carefully matching Biden's 1989 approach, Democrats were concerned that Hatch might alter the process to stop one politician from blocking nominees, because the Chair admonished that he would resist colleagues' efforts to veto Bush's judicial appointments.[19] Hatch defended his procedure by maintaining that one member's blue slip would receive great weight although not be dispositive. Sollenberger later commented that Hatch's statement "clearly contradicted how blue slips were used during Clinton's administration."[20] Over the spring of 2001, the parties rigorously debated their concerns in hearings and committee meetings but reached no accord before Senator James Jeffords (R-VT) chose to leave the Republican Party and become an Independent, thus granting the Democrats a Senate majority.[21]

In June 2001, when Senator Patrick Leahy (D-VT) ascended to the chairmanship, he said that the panel would move nominees only after both home state senators returned positive slips and once he was satisfied that

16. Sollenberger, *supra* note 5, at 15; *see id.* at 15-16.

17. Sollenberger, *supra* note 1, at 137-38.

18. Denning, *supra* note 1, at 83-84; Sollenberger, *supra* note 5, at 16-19.

19. Goldman et al., *supra* note 4, at 17; Sollenberger, *supra* note 1, at 140.

20. Sollenberger, *supra* note 1, at 140. Senator Hatch's policy was designed to swiftly confirm a newly elected conservative President's nominees, not a "principled stand to protect senatorial rights." *Id.* at 141.

21. Denning, *supra* note 1, at 83-85.

the White House had consulted each of them.[22] Sollenberger found that this policy was "a profound and significant shift from Hatch's post-Clinton blue-slip policy."[23] He also remarked that Leahy permitted Michigan Democratic Senators Carl Levin and Debbie Stabenow to curb processing of "all nominations to the Sixth Circuit"; based on this observation, Sollenberger commented that the Chair apparently strengthened the procedure on slips to benefit his partisan views in a manner analogous to Hatch.[24] When the GOP won the chamber with the November 2002 midterm elections, Hatch assumed the chairmanship again and reinstated his earlier practices.[25]

At the commencement of the 109th Congress in January 2005, Senator Arlen Specter (R-PA) replaced Hatch as Judiciary Chair.[26] Specter determined that he would not assess nominees who lacked two home state senators' support.[27] As Chair, Specter likely pursued a different blue slip

22. Sollenberger, *supra* note 5, at 20; Elizabeth A. Palmer, *Senate GOP Backs Down from Dispute Over Handling of Nominees*, CQ WEEKLY, June 9, 2001, at 1360 (on file with author); Elizabeth Palmer & Amy Fagan, *Power Shift at Judiciary Could Be Problem for Bush*, CQ DAILY MONITOR, May 24, 2001, at 3; *see* Sollenberger, *supra* note 1, at 142.

23. Sollenberger, *supra* note 1, at 142; *see* Sollenberger, *supra* note 5, at 20.

24. Sollenberger, *supra* note 1, at 143; Sollenberger, *supra* note 5, at 21; *see* Neil A. Lewis, *Here Come the Judges: First the Senate, Now the Courts of Appeals*, N.Y. TIMES, Dec. 1, 2002, at C3; Jonathan Ringel, *Showtime at Senate Judiciary*, LEGAL TIMES, Sept. 3, 2001 (on file with author); *supra* note 23.

25. He declared that one adverse slip would not prevent a hearing or block an appellate selection. Tony Mauro, *Estrada*; *Sutton on the Senate Fight Card*, LEGAL TIMES, Jan. 27, 2003 (on file with author); *see* Sollenberger, *supra* note 5, at 21; *supra* notes 18-20 and accompanying text. Hatch even permitted the committee to consider an appellate court nominee whose home state senators returned two negative slips, which purportedly marked "only the second known case" of this in panel history. Sollenberger, *supra* note 5, at 22; *see* Binder, *supra* note 2, at 15 n.53; Goldman et al., *supra* note 4, at 17.

26. Sollenberger, *supra* note 1, at 146.

27. *Id.*

regime because he was politically moderate compared to Hatch and President Bush while substantially less deferential to the President than was Hatch.[28] Specter also sought to avoid confirmation arguments over controversial nominees and, therefore, reviewed consensus nominees first.[29]

In the 2006 elections, Democrats recaptured the Senate, which meant that Leahy became the Chair again in the 110th Congress.[30] Leahy announced that one senator could block action with a negative slip, which continued procedures that he had used across the 107th Congress and enabled Democrats to halt some of President Bush's nominees while the government was divided.[31] Sollenberger claimed that Leahy's approach "conformed well to his partisan and ideological goals . . . [while effectively being] closest to implementing . . . [Eastland's] blue slip policy."[32] Writing at the termination of the first session in the 111th Congress, Sollenberger asserted that practices which had governed the last thirty years suggested

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28. *Id*. at 147-48; *see* Roger E. Hartley & Lisa M. Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 117 POL. SCI. Q. 259, 274-75 (2002) (asserting that the Judiciary Committee Chair's discretion is critical).

29. Sollenberger, *supra* note 1, at 148.

30. *Id*. at 149; *see* Memorandum from the Senate Judiciary Comm. Majority to Members of the News Media, History and Context of the Blue Slip Courtesy (Nov. 2, 2017) (on file with author); *Senators Can Veto Judicial Picks*, GRAND RAPIDS PRESS, Jan. 5, 2007, at B6 (on file with author).

31. Sollenberger, *supra* note 1, at 149. *But see* 161 CONG. REC. S2,029 (daily ed. Mar. 26, 2015) (statement of Sen. Leahy) (contending that Democrats in the last two years of George W. Bush's Administration "continued to hold regular hearings on judges and . . . confirmed 68 district and circuit court" nominees).

32. Sollenberger, *supra* note 1, at 151; *see supra* notes 7, 24 and accompanying text.

that the majority would probably "weaken" slips and predicted that Leahy could process nominees who lacked two blue slips.[33]

Despite Sollenberger's fine scholarship, his prognostication about Senator Leahy proved incorrect. During President Barack Obama's first six years, Leahy refused to move any nominee who lacked a slip delivered by each politician from his or her home state. One prominent illustration was Steve Six, whom President Obama tapped for a vacancy in Kansas on the Tenth Circuit.[34] When Kansas Republican Senators Pat Roberts and Jerry Moran agreed that Six could receive a hearing yet later opposed his appointment, Leahy did not permit a committee vote, which abruptly ended the nominee's Senate consideration.[35] After Republicans won the Senate in the 2014 elections, Grassley assumed the chairmanship and continued Leahy's blue slip procedure during President Obama's last half-term.[36]

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33. Sollenberger, *supra* note 1, at 152-53; *see supra* notes 9-32 and accompanying text. Numerous Republicans, especially in the Senate, probably shared this view.

34. Press Release, White House, Office of the Press Sec'y, President Obama Nominates Steve Six to the United States Circuit Court (Mar. 9, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/03/09/president-obama-nominates-steve-six-united-states-circuit-court [https://perma.cc/Q8G3-DL2N]; Editorial, *Steve Six Deserved Better*, WICHITA EAGLE (July 29, 2011), https://www.kansas.com/opinion/editorials/article1078676.html [https://perma.cc/P2QT-JS8B].

35. *Confirmation Hearings on Federal Appointments: Hearings Before the Comm. on the Judiciary, United States Senate*, 112th Cong., 734-41 (2011); *Results of Executive Business Meeting*, S. COMMITTEE ON JUDICIARY (July 28, 2011), https://www.judiciary.senate.gov/imo/media/doc/ExecutiveBusinessMeetingResults-07-28-2011.pdf [https://perma.cc/JF6P-NB9G].

36. He required two slips. Jennifer Bendery & Alissa Scheller, *Donald Trump Is in the Perfect Position to Dramatically Remake the Courts*, HUFFINGTON POST (June 22, 2017, 5:46 AM EST), https://www.huffingtonpost.com/entry/trump-judicial-nominees-federalist-society_us_59497166e4b04c5e50256f0c [https://perma.cc/M3BQ-C4L9]; *see* Carl Tobias, *Confirming Circuit Judges in a Presidential Election Year*, 84 GEO. WASH. L. REV. ARGUENDO 160, 161

An important reason why Senator Grassley and Senator Leahy required two blue slips from home state senators throughout President Obama's eight-year tenure was that all Republican senators insisted on consultation from the White House before approving nominees for their home states. If that did not happen, the Republican Conference stated that it would oppose any nominee on whom there was inadequate consultation.[37]

In 2017, after President Trump's election, Grassley maintained the policy but stated that prior Chairs have made exceptions—intimating that he could act, for example, to cabin abuse or differentiate appellate court from district court openings.[38] Nonetheless, Grassley delayed instituting the "reforms" until mid-November, apparently because he concluded from

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(2016) (discussing how GOP senators blue slipped four of President Obama's appellate court nominees in 2016).

37. Letter from All Republican Senators to President Barack H. Obama (Mar. 2, 2009), https://www.republican.senate.gov/public/index.cfm/blog?ID=3C522434-76E5-448E-9EAD-1EC214B881AC [https://perma.cc/46AV-3LJN].

38. Robert Barnes, *Republicans Likely to Change Custom That Allows Democrats to Block Judicial Choices*, WASH. POST (May 25, 2017), https://www.washingtonpost.com/politics/courts_law/senate-republicans-consider-changing-custom-that-allows-democrats-to-block-judicial-choices/2017/05/25/d49ea61a-40b1-11e7-9869-bac8b446820a_story.html [https://perma.cc/TWG4-3MP5]; Seung Min Kim, *Trump's Judge Picks Snub Democrats*, POLITICO (Aug. 11, 2017), https://www.politico.com/story/2017/08/11/senate-judges-democrats-trump-241448 [https://perma.cc/FLW7-YC8J]. Grassley expressly endorsed Leahy's concept and deployed his approach during Obama's last half-term, even confirming the proposition after Trump was elected. *E.g.*, Sen. Chuck Grassley, *Working to Secure Iowa's Judicial Legacy*, DES MOINES REG. (Apr. 14, 2015), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/04/15/working-secure-iowas-judicial-legacy/25801515 [https://perma.cc/FQR9-Y57L]; Joe Palazzolo, *Donald Trump Looks to Put His Stamp on Federal Courts*, WALL ST. J. (Nov. 11, 2016), https://www.wsj.com/articles/donald-trump-looks-to-put-his-stamp-on-federal-courts-1478892603 [https://perma.cc/W57N-K95X].

speaking with home state Democrats that virtually none were abusing blue slips.[39]

Over the course of 2017, numerous Democrats exercised considerable caution before retaining their slips. For example, Senators Joe Donnelly (D-IN) and Heidi Heitkamp (D-ND) delivered slips rather promptly, when they found no compelling reason to retain them.[40] When Michigan Senators Debbie Stabenow and Gary Peters tendered slips less rapidly, numerous critics accused them of delay; one—the Judicial Crisis Network—even mounted a costly advertising campaign to pressure the senators.[41] However, both members were carefully awaiting the nominee's

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39. Virtually no Democratic senators delayed hearings as long as GOP senators did for Obama nominees in 2016. Letter from Sen. Dianne Feinstein, Ranking Member, Sen. Comm. on the Judiciary, et al. to Sen. Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary (Nov. 17, 2017), https://www.feinstein.senate.gov/public/_cache/files/6/8/68fb5673-bf3d-46b6-b60c-7f8f0f1a975e/7E140B1C0A5A85F747F9E91CF69DA93E.11.17.17-letter-from-judiciary-dems-to-grassley-final.pdf [https://perma.cc/MR5W-S53T]; Press Release, Senator Dianne Feinstein, Feinstein: Democrats Vetting Trump Nominees, No Obstruction (Oct. 16, 2017), https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=C4B65EE1-1BEB-491E-9FF9-5A59906B2807 [https://perma.cc/3SG6-C3LQ]; *infra* notes 41-47; *see* Harsh Voruganti, *Bending Blue Slips*: *What Was the Need?*, VETTING ROOM (Nov. 17, 2017), https://vettingroom.org/2017/11/17/bending-blue-slips-what-was-the-need/comment-page-1 [https://perma.cc/UT2E-4N77]; Harsh Voruganti, *Bending Blue Slips*: *Grassley's Strategic Error*, VETTING ROOM (Nov. 17, 2017), https://vettingroom.org/2017/11/24/grassleys-strategic-error [https://perma.cc/4G7G-CFP7] [hereinafter *Strategic Error*].

40. David Lat, *Circuit Court Nominations in the Trump Administration: The Latest News and Rumor Part 2*, ABOVE THE LAW (July 26, 2017), https://abovethelaw.com/2017/07/circuit-court-nominees-in-the-trump-administration-the-latest-news-and-rumor-part-2 [https://perma.cc/Y4JG-6J9N]. For the confirmation votes, see 163 CONG. REC. S6,908 (daily ed. Oct. 31, 2017) (Circuit Judge Amy Coney Barrett); *id.* at S6,202 (daily ed. Sept. 28, 2017) (Circuit Judge Ralph Erickson).

41. Melissa Burke, *Stabenow*, *Peters to Meet with Judicial Nominee Larsen*, DETROIT NEWS (July 25, 2017), https://www.detroitnews.com/story/news/politics/2017/07/24/stabenow-peters-meet-larsen/103972892 [https://perma.cc/48KB-DQBU]; Kim,

responses to questionnaires. Quickly following their completion, the senators analyzed those responses, convened a meeting with the nominee, and soon thereafter proffered slips.[42]

In more recent circumstances when Democrats have retained blue slips, they have done so mainly in response to what they viewed as inadequate consultation from the White House, and the Democrats conducted nominee evaluations for shorter periods than those which GOP senators undertook of Obama nominees. For example, Minnesota Democratic Senators Amy Klobuchar and Al Franken received negligible administration consultation about the nomination of David Stras to the Eighth Circuit. Franken ultimately retained his slip.[43] The White House

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supra note 38; Todd Spangler, *Stabenow, Peters Let Joan Larsen Nomination Move Forward*, DETROIT FREE PRESS (Aug. 4, 2017), https://www.freep.com/story/news/local/michigan/2017/08/04/joan-larson-nomination-federal-court/540658001 [https://perma.cc/URK6-5QF2].

42. Unlike Presidents Bush and Obama, "Trump's White House did not consult with Michigan's senators." Melissa Nann Burke, *Mich. Senators Let Trump Appeals Judge Choice Advance*, DETROIT NEWS (Aug. 4, 2017), https://www.detroitnews.com/story/news/politics/2017/08/04/larsen-appeals-nomination-advance/104293518 [https://perma.cc/3CTU-RC8P]; Barnes, *supra* note 38; *see* 163 CONG. REC. S6,944 (daily ed. Nov. 1, 2017) (Circuit Judge Joan Larsen's confirmation vote).

43. Press Release, Al Franken, Senator for Minnesota, Senator Franken to Oppose Nomination of Justice David Stras for Eighth Circuit Court of Appeals (Sept. 5, 2017) , https://web.archive.org/web/20171208022046/https://www.franken.senate.gov/?p=press_release&id=3753 [https://perma.cc/7XJS-42AD]; Seung Min Kim, *Democrats Take on Trump Over Court Vacancies*, POLITICO (May 8, 2017), https://www.politico.com/story/2017/05/08/trump-judicial-nominees-democrats-238046 [https://perma.cc/NR5L-WACQ]; *see* Erik Paulsen, *U.S. Rep. Erik Paulsen Writes: Klobuchar, Franken Impede the Path of an Outstanding Judge*, STAR TRIB. (Aug. 25, 2017), http://www.startribune.com/klobuchar-franken-impede-the-path-of-an-outstanding-judge/441683303 [https://perma.cc/R64W-89LJ]. For post-nomination developments involving Circuit Judge David Stras, see *Nomination Hearing*, *supra* note 46; *Results of Executive Business Meeting*, S. COMMITTEE ON JUDICIARY (Jan. 18, 2018), https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20Business%20Meeting%2001-18-181.pdf [https://perma.cc/NK7N-

similarly appeared to nominate Ryan Bounds for the Ninth Circuit without granting Oregon Democratic Senators Ron Wyden and Jeff Merkley an opportunity to activate a longstanding merit selection commission, prompting the senators to retain their slips.[44] The White House analogously provided Wisconsin Democratic Senator Tammy Baldwin

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LWFV]; 164 CONG. REC. S568 (daily ed. Jan. 30, 2018) (Circuit Judge David Stras's confirmation vote). Numerous Republican senators' aggressive blue slip use for ideological purposes prevented President Obama from nominating and confirming many strong picks and most retained their slips longer than Franken. Russell Wheeler, *Senate GOP Used "Blue Slips" to Block Obama Judicial Nominees, But Now Wants to Trash the Practice*, BROOKINGS INST. (May 25, 2017), https://www.brookings.edu/blog/fixgov/2017/05/25/blue-slips-and-judicial-nominees-in-senate [https://perma.cc/QZ35-DXPZ]; *see* Tobias, *supra* note 36.

44. Letter from Donald F. McGahn II, White House Counsel, to Sens. Ron Wyden & Jeff Merkley (Sept. 6, 2017), https://freebeacon.com/wp-content/uploads/2017/09/mcgahn-letter-to-wyden-merkley.pdf [https://perma.cc/UGP8-45BB]; Letter from Sens. Ron Wyden & Jeffrey A. Merkley to Donald F. McGahn II, White House Counsel (Sept. 7, 2017), http://static.politico.com/59/2a/f5b886e44d6ba505b1551125a32e/wh-judicial-vacancy-signed.pdf [https://perma.cc/2NHX-V7H6]; Press Release, White House, Office of the Press Sec'y, President Donald J. Trump Announces Seventh Wave of Judicial Candidates (Sept. 7, 2017), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-seventh-wave-judicial-candidates [https://perma.cc/6H5Z-RTLN]. For post-nomination developments involving nominee Ryan Bounds, see Maxine Bernstein, *Oregon's U.S. Senators Say Federal Prosecutor Ryan Bounds Unsuitable for 9th Circuit Vacancy*, OREGONIAN (Feb. 12, 2018), https://www.oregonlive.com/portland/index.ssf/2018/02/oregons_us_senators_say_federal.html [https://perma.cc/P3J3-BAZ4]; Jimmy Hoover & Michael Macagnone, *9th Circ. Pick Forces Grassley to Choose: Trump or Tradition?*, LAW360 (Mar. 29, 2018), https://www.law360.com/articles/1025855 [https://perma.cc/M3XP-TU3H]; *Nomination Hearing*, S. COMMITTEE ON JUDICIARY (May 9, 2018), https://www.judiciary.senate.gov/meetings/05/09/ S. COMMITTEE ON JUDICIARY (June 7, 2018), https://www.judiciary.senate.gov/imo/media/doc/06-07-18%20Results%20of%20Executive%20Business%20Meeting.pdf [https://perma.cc/P32T-AHQN]; *infra* note 62 and accompanying text.

minimal consultation by nominating Michael Brennan for the Seventh Circuit whom the bipartisan selection commission—which she and Wisconsin Republican Senator Ron Johnson had established—did not recommend, which prompted Baldwin to retain her slip.[45] Louisiana GOP Senator John Kennedy, too, retained his slip because the legislator was "undecided" about Kyle Duncan, a nominee for a Louisiana Fifth Circuit

45. Patrick Marley & Jason Stein, *Baldwin*: *Trump Ignored Bipartisan Panel by Nominating Gov. Scott Walker Ally to 7th Circuit Court of Appeals*, MILWAUKEE J. SENTINEL (Aug. 4, 2017), https://www.jsonline.com/story/news/politics/2017/08/04/donald-trump-appoints-gov-scott-walker-ally-federal-7th-circuit-court-appeals/539442001 [https://perma.cc/P4WG-JYWX]; Press Release, White House, Office of the Press Sec'y, President Donald J. Trump Announces Sixth Wave of Judicial Candidates and Fifth Wave of U.S. Attorney Candidates (Aug. 3, 2017), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-sixth-wave-judicial-candidates-fifth-wave-u-s-attorney-candidates [https://perma.cc/5BZU-NS8H]; *see* Carl Tobias, *Filling the Seventh Circuit Vacancies*, 2017 WIS. L. REV. 225. For post-nomination developments involving Circuit Judge Michael Brennan, see Sen. Charles Grassley, *Chuck Grassley: Senate Democrats Are Trying to Stall Trump's Nominations by Rewriting the History of 'Blue Slips'*, WASH. EXAMINER (Feb. 22, 2018), https://www.washingtonexaminer.com/chuck-grassley-senate-democrats-are-trying-to-stall-trumps-nominations-by-rewriting-the-history-of-blue-slips [https://perma.cc/GER7-UF2V]; Melissa Quinn, *Democrats Fume as GOP Ignores Senate Tradition to Approve Trump's Judicial Nominee*, WASH. EXAMINER (Feb. 15, 2018), https://www.washingtonexaminer.com/democrats-fume-as-gop-ignores-senate-tradition-to-approve-trumps-judicial-nominee [https://perma.cc/P7FD-7ZRA]; Todd Ruger, *Grassley Moves on Judicial Nominee Over Baldwin's Objection*, ROLL CALL (Jan. 24, 2018), https://www.rollcall.com/news/politics/grassley-moves-judicial-nominee-baldwins-objection [https://perma.cc/NPN9-WGRX]; *Nomination Hearing*, S. COMMITTEE ON JUDICIARY (Jan. 24, 2018), https://www.judiciary.senate.gov/meetings/01/24/2018/nominations [https://perma.cc/7MUV-K4UU]; *Results of Executive Business Meeting*, S. COMMITTEE ON JUDICIARY (Feb. 15, 2018), https://www.judiciary.senate.gov/imo/media/doc/02-15-18%20Results%20of%20Executive%20Business%20Meeting.pdf [https://perma.cc/EX66-MMPG]; 164 CONG. REC. S2,607 (daily ed. May 10, 2018) (Circuit Judge Michael Brennan's confirmation vote).

vacancy, although he eventually agreed to a hearing for this nominee.[46] Pennsylvania Democratic Senator Bob Casey also retained his slip for Third Circuit Judge David Porter because the lawmaker had recommended several well-qualified, mainstream candidates to the White House, which rejected them after nominal consideration and little consultation with Casey.[47]

Although Grassley collegially attempted to cajole Democratic home state politicians into accelerating return of their blue slips when the

46. Kennedy voiced concern that the nominee was a "Washington lawyer" about whom he knew little, and the White House Counsel informed him whom President Trump would nominate rather than consulting. For post-nomination developments involving Circuit Judge Kyle Duncan, see *Nomination Hearing*, S. COMMITTEE ON JUDICIARY (Nov. 29, 2017), https://www.judiciary.senate.gov/meetings/11/29/2017/nominations [https://perma.cc/K8DV-2Y5K]; *see also* 163 CONG. REC. S7,285 (daily ed. Nov. 16, 2017) (statement of Sen. Grassley); 164 CONG. REC. S2,371 (daily ed. Apr. 24, 2018) (Circuit Judge Kyle Duncan's confirmation vote); *infra* notes 60-61 and accompanying text.

47. For post-nomination developments involving Circuit Judge David Porter, see *Nomination Hearing*, S. COMMITTEE ON JUDICIARY (June 6, 2018), https://www.judiciary.senate.gov/meetings/06/06/2018/nominations [https://perma.cc/GFZ7-WC3K]; *Results of Executive Business Meeting*, S. COMMITTEE ON JUDICIARY (July 19, 2018), https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20Business%20Meeting%2007-19-18.pdf [https://perma.cc/EZU6-U47L]; *see* Tracie Mauriello, *Why Bob Casey Thinks the Confirmation Hearing for Pittsburgh Attorney David Porter Is Breaking Protocol*, PITTSBURGH POST-GAZETTE (June 4, 2018), http://www.post-gazette.com/news/politics-nation/2018/06/04/David-Porter-third-circuit-court-appeals-confirmation-hearing-Senate-judiciary-committee-bob-casey-chuck-grassley-blue-slip/stories/201806040156 [https://perma.cc/R3JM-PNH3] (allowing hearing despite Sen. Casey's slip retention and honoring Sen. Toomey's for Obama nominee); Jonathan Tamari, *Pat Toomey Used Senate Tradition to Block an Obama Pa. Judicial Pick. GOP Leaders Won't Give Bob Casey the Same Deference*, PHILA. INQUIRER (July 17, 2018), http://www2.philly.com/philly/news/politics/pat-toomey-used-senate-tradition-to-block-an-obama-judicial-pick-from-pa-gop-leaders-wont-give-bob-casey-the-same-deference-20180717.html [https://perma.cc/B8Q6-8YCH]; 164 CONG. REC. S6,883 (daily ed. Oct. 11, 2018) (Circuit Judge David Porter's confirmation vote).

committee possessed sufficient qualified nominees to smoothly process them—as evidenced by his waiting sufficient time for the Oregon senators' panel to recommend prospects—Grassley experienced mounting pressure to change the blue slip procedure as 2017 progressed.[48] This dynamic was animated by the perceived need for President Trump and the GOP Senate majority to convince the American people that they had achieved some policy successes.[49] Particularly important were statements by Senator Mitch McConnell (R-KY), the Majority Leader, who criticized Democrats for obstructing President Trump's judicial nominees. He argued that blue slips were meant to encourage consultation rather than operate as a "blackball," asserted that the slips principally applied to district court nominees, and urged swift change.[50]

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48. Ryan Lovelace, *Inside Republicans' Plot to Ensure Trump's Federal Judge Victories*, WASH. EXAMINER, (Nov. 5, 2017), https://www.washingtonexaminer.com/inside-republicans-plot-to-ensure-trumps-federal-judge-victories [https://perma.cc/2L7N-AZ2Z]; Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here's How.*, N.Y. TIMES (Nov. 11, 2017), https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html [https://perma.cc/F6D8-VVG7].

49. Burgess Everett, *McConnell Aims to Reshape Courts in Case Senate Flips*, POLITICO (Apr. 20, 2018), https://www.politico.com/story/2018/04/20/mcconnell-courts-judges-confirmation-senate-537366 [https://perma.cc/3RXS-67DL]; David Hawkings, *GOP Slips Past Another Custom, and Democrats Turn Blue*, ROLL CALL (May. 30, 2018), https://www.rollcall.com/news/hawkings/blue-slip-judicial-nominees-custom [https://perma.cc/GNZ7-28HH]; Carl Hulse, *Trump and McConnell See a Way to Make Conservatives Happy*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/us/politics/trump-mcconnell-judicial-nominees.html [https://perma.cc/9YJT-MULC]; Jamiles Lartey, *Trump's Judicial Picks: 'The Goal is to End the Progressive State'*, GUARDIAN (Nov. 22, 2017), https://www.theguardian.com/us-news/2017/nov/22/federal-court-judicial-nominations-donald-trump [https://perma.cc/2GSR-JU6W]; Dahlia Lithwick, *Judges Over Principles*, SLATE (Nov. 22, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/11/the_never_trump_legal_movement_has_morphed_into_a_plan_to_pack_the_courts.html [https://perma.cc/6BPJ-X47W].

50. 163 CONG. REC. S7,287 (daily ed. Nov. 16, 2017); Fred Barnes, *McConnell Goes to the Mattresses for Trump's Judicial Nominees*, WEEKLY STANDARD (Oct. 11,

Additional conservatives have criticized the blue slip process and championed modification to speed approval of President Trump's court prospects. These legislators include Senators John Cornyn (R-TX) and Tom Cotton (R-AR), who proposed abrogating or substantially limiting the blue slip practice.[51] Outside of the Senate, commentator Hugh Hewitt and an operative working on behalf of the Koch Brothers both urged lawmakers to alter the blue slip process or nullify slips.[52]

2017), https://www.weeklystandard.com/fred-barnes/mitch-mcconnell-goes-to-the-mattresses-for-trumps-judicial-nominees [https://perma.cc/6SM5-V2BL]; Hulse, *supra* note 49; Carl Hulse, *As G.O.P. Moves to Fill Courts, McConnell Takes Aim at an Enduring Hurdle*, N.Y. TIMES (Sept. 13, 2017), https://www.nytimes.com/2017/09/13/us/politics/mcconnell-federal-judges-trump.html [https://perma.cc/M3ZX-45BZ]. *But see* Editorial, *A Hypocritical Battle Over Blue Slips*, N.Y. TIMES (Sept. 15, 2017), https://www.nytimes.com/2017/09/15/opinion/senate-blue-slips-republicans.html [https://perma.cc/DN5Y-U8N4].

51. Seung Min Kim, *Cotton Prepared to Toss Senate's 'Blue Slip' Rule on Judicial Nominees*, POLITICO (May 9, 2017), https://www.politico.com/story/2017/05/09/cotton-senate-judges-blue-slip-238168 [https://perma.cc/AMK5-FWMQ]; Lydia Wheeler, *GOP Talks of Narrowing 'Blue-Slip' Rule for Judges*, THE HILL, (May 20, 2017), https://thehill.com/homenews/senate/334296-gop-talks-of-narrowing-blue-slip-rule-for-judges [https://perma.cc/7W2S-66L8]; *see* Editorial, *Maintaining an Independent Judiciary Is Critical for Democracy*, ST. LOUIS POST-DISPATCH (July 23, 2017), https://www.stltoday.com/opinion/editorial/editorial-maintaining-an-independent-judiciary-is-critical-for-democracy/article_8ecb178a-1b6e-5a7a-ac21-cdd87a61a2ef.html [https://perma.cc/AQ26-ETXG].

52. Hugh Hewitt, *The One Obstacle to an Originalism-Driven Judiciary*, WASH. POST, (Apr. 11, 2017), https://www.washingtonpost.com/opinions/the-one-obstacle-to-an-originalism-driven-judiciary/2017/04/11/57aa2ae2-1e4e-11e7-a0a7-8b2a45e3dc84_story.html [https://perma.cc/W5ZP-EFA6]; Fredreka Schouten, *Why the Koch Brothers Want to Kill an Obscure Senate Rule to Help Shape the Federal Courts*, USA TODAY (July 4, 2017), https://www.usatoday.com/story/news/politics/2017/07/04/why-koch-brothers-want-kill-obscure-senate-rule-help-shape-federal-courts/441424001 [https://perma.cc/JX4J-X388]; *see* David Lat, *Good Riddance to 'Blue Slips'*, N.Y. TIMES (May 9, 2018), https://www.nytimes.com/2018/05/09/opinion/senate-judicial-nominees-blue-slips.html [https://perma.cc/E38G-SK2Q] (arguing that eliminating

President Trump has castigated Democrats for obstructing his nominees;[53] the chief executive publicly exhorted senators to marshal the nuclear option and confirm Justice Gorsuch long before they agreed to do so [54] and has expressed frustration with chamber procedures which he seems to find dilatory.[55] President Trump's critique, which explicitly skewers putative obstruction, indicates that he appears to favor changing

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blue slips will allow Presidents and Senates to fill judicial vacancies, which will help federal courts and litigants).

53. Press Release, White House, Office of the Press Sec'y, Fact Sheet: President Donald J. Trump's Nominees Face Needless Obstruction (July 10, 2017), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-nominations-face-needless-obstruction [https://perma.cc/8FGE-FUQB]; Diana Stancy Correll, *Trump Blasts Senate Democrats for 'Obstructing' Nomination Process*, WASH. EXAMINER (Apr. 19, 2018), https://www.washingtonexaminer.com/news/trump-blasts-senate-democrats-for-obstructing-nomination-process [https://perma.cc/T5T7-2R4E]; Carl Hulse, *Democrats Perfect Art of Delay While Republicans Fume Over Trump Nominees*, N.Y. TIMES (July 18, 2017), https://www.nytimes.com/2017/07/17/us/politics/senate-democrats-art-of-delay-trump-nominees.html [https://perma.cc/3R6W-BHWX].

54. Matt Flegenheimer, *Trump Says 'Go Nuclear' as Democrats Gird for Gorsuch Fight*, N.Y. TIMES (Feb. 1, 2017), https://www.nytimes.com/2017/02/01/us/politics/neil-gorsuch-supreme-court-trump.html [https://perma.cc/73KN-V5YL]; John Wagner & Ashley Parker, *Trump Endorses Use of 'Nuclear Option' to Confirm His Supreme Court Pick*, WASH. POST (Feb. 1, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/02/01/trump-endorses-use-of-nuclear-option-to-confirm-his-supreme-court-pick [https://perma.cc/PT7T-YHYL].

55. Aaron Blake, *Trump Asks for More Power. Here's Why the Senate GOP Will Resist*, WASH. POST (May 30, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/05/02/3-reasons-the-gop-wont-nuke-the-filibuster-and-give-trump-more-power [https://perma.cc/3G5V-YWPS]; Julie Hirschfeld Davis, *Trump*, *In Wake of Deal to Avoid a Shutdown Now*, *Calls for One Later*, N.Y. TIMES (May 2, 2017), https://www.nytimes.com/2017/05/02/us/politics/good-shutdown-congress-trump.html [https://perma.cc/7WJ9-C93P].

slip procedures.[56] Grassley first seemed to resist calls for dramatic alteration, but President Trump's statements and the criticisms above could have persuaded the Chair that modification was appropriate, despite Grassley's earlier statements that he would apply the policy as Leahy and Grassley deployed it throughout Obama's presidency.

In Grassley's remarks on the Senate floor on November 13 and November 16, 2017, he addressed the blue slip issue. Grassley stated that he would "honor the blue-slip process[,] but that there are always exceptions."[57] He observed that the major purpose of blue slips was "encouraging consultation between the White House and the Senate" and that they were not meant to afford home state lawmakers "veto power over a nominee." The Chair stated that he would not "allow Senators to prevent a committee hearing for political or ideological reasons."[58] Grassley remarked that he would follow the practice which Senator Biden set forth —a "negative blue slip will be a 'significant factor' for the committee to weigh but 'it will not preclude consideration,'" unless the administration fails to consult.[59] Grassley elaborated that he was more likely to honor a single politician's retention of a blue slip for a district court nominee because appellate courts govern multiple states.[60]

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56. *See* Hulse, *supra* note 49; Ed Kilgore, *Trump Is Going to Lose It When He Finds out About This Obscure Senate Rule*, N.Y. MAG. (May 8, 2017), http://nymag.com/daily/intelligencer/2017/05/trump-will-lose-it-when-he-finds-out-about-this-senate-rule.html [https://perma.cc/N9HB-YTFW].

57. 163 CONG. REC. S7,285 (daily ed. Nov. 16, 2017); *see also* 163 CONG. REC. S7,174-75 (daily ed. Nov. 13, 2017) (statement of Sen. Grassley) ("I intend to honor the blue-slip courtesy, but there have always been exceptions.").

58. 163 CONG. REC. S7,285 (daily ed. Nov. 16, 2017). Grassley stated that the latter two assertions are the "least reasons not to have a hearing" and are "not consistent with historical practice." *Id.*

59. *Id.*; 163 CONG. REC. S7,174 (daily ed. Nov. 13, 2017); *see Nomination Hearing*, *supra* note 47 (statements of Sens. Grassley and Franken on blue slips); *supra* note 14 and accompanying text.

60. 163 CONG. REC. S7,285 (daily ed. Nov. 16, 2017); *see supra* notes 44, 46-47. *But see* sources cited *supra* notes 38, 49, 58; *infra* notes 67-68, 74.

Operating under this newly clarified policy, Grassley scheduled committee hearings for appeals court nominees from Minnesota, Ohio, Oregon, Louisiana, Wisconsin, Pennsylvania, and Washington, finding that negative slips retained by home state senators should not block the nominees because there had been adequate White House consultation with both senators.[61] The administration's decision to withdraw the Oregon nomination on the day that the Senate had arranged a floor vote partly derived from Oregon senators' persistent, vociferous opposition to Grassley's blue slip policy; however, it was also triggered by Senator Tim Scott (R-SC), who expressed concerns about the nominee's inflammatory college writings respecting diversity, inclusion, rape victims, persons of color, and the LGBTQ community.[62]

The Chair set an October 24 hearing for the Washington Ninth Circuit nominee, who lacked blue slips from either Washington home state senator; the hearing, which occurred weeks after the Senate recessed to campaign, lasted fewer than twenty minutes with merely two GOP members attending and was the most recent, relevant example of several critical phenomena.[63] Grassley's resolution of the Washington blue slip

61. Grassley found that Franken's opposition was political or ideological. 163 CONG. REC. at S7,285-86 (daily ed. Nov. 16, 2017); *see supra* notes 43, 45 and accompanying text (discussing blue slip retention by Sens. Franken and Baldwin). For Grassley's Wisconsin decision and Democrats' criticism of that determination, see sources cited *supra* note 45. Grassley observed that Senator Kennedy did not oppose a hearing but was undecided on the candidate's nomination. 163 CONG. REC. S7,286 (daily ed. Nov. 16, 2017); *see supra* note 46. For Grassley's treatment of Washington and Senator Patty Murray's response, see sources cited *infra* notes 63-65. For Ohio, Oregon and Pennsylvania, Grassley said relatively little publicly but seemingly implied that he found adequate White House consultation by scheduling the hearings.

62. 164 CONG. REC. S5,098 (daily ed. July 19, 2018) (withdrawing the nomination); Thomas Kaplan, *White House Withdraws Appeals Court Nominee Who Deplored Multiculturalism*, N.Y. TIMES (July 19, 2018), https://www.nytimes.com/2018/07/19/us/politics/trump-judge-senate-bounds.html [https://perma.cc/4DLX-7UKW]; *see* Hulse, *supra* note 5.

63. *Nomination Hearing*, S. COMMITTEE ON JUDICIARY (Oct. 24, 2018), https://www.judiciary.senate.gov/meetings/10/24/2018/nominations [https://perma.cc/HGA6-JLQP]; *see* Jennifer Bendery, *Senate's Out? Nobody's Around? Perfect Time to Advance Trump's Court Picks, Says*

dispute at once shows the deficiencies in his blue slip policy as currently practiced and going forward as well as the intrinsic difficulties entailed in leaving to the discretion of a single person (the Chair) the practical application of such unclear and malleable words as "adequate consultation" and "abuse," which require the decisionmaker to probe the minds of senators and the White House Counsel. On October 18, Grassley wrote a letter accusing Washington Democratic Senators Patty Murray and Maria Cantwell of delaying Senate consideration of the Washington nominee, demanded explanations for retaining the blue slips, and intimated that his investigation found the White House had adequately consulted with the senators.[64] On October 22, Senator Murray wrote a letter which clarified or corrected "several mischaracterizations or otherwise false assertions" in Grassley's letter; Murray elaborated that the assertion that she reached a "deal with the White House to exchange three favorable Western District court nominees for a Ninth Circuit Court nominee chosen by the White House, is simply false," detailed her relevant discussions with White House Counsel Don McGahn (which demonstrated that there was no deal), asserted that the Chair "made no attempt to discuss the nomination process with myself and Senator Cantwell," and expressed "fear that the clear and intentional conflation of processes for selecting district court and Ninth Circuit Court nominees from Washington state is meant to conceal an underlying motivation to completely eradicate

GOP., HUFFINGTON POST (Oct. 24, 2018, 7:40 PM ET), https://www.huffingtonpost.com/entry/trump-judicial-nominees-republicans_us_5bd0c08ee4b0d38b587f50e6?2yj [https://perma.cc/FXC7-QG9G]; Jordain Carney, *Controversial Trump Judicial Nominee Advances After Two Senators Attend Hearing*, THE HILL (Oct. 24, 2018), https://thehill.com/homenews/senate/412976-controversial-trump-judicial-nominee-advances-after-two-senators-attend[https://perma.cc/CY65-ZLLF].

64. Letter from Sen. Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary, to Sens. Patty Murray & Maria Cantwell (Oct. 18, 2018), https://www.judiciary.senate.gov/imo/media/doc/2018-10-18%20CEG%20to%20Murray,%20Cantwell%20-%20Eric%20D.%20MIller%20Nomination.pdf[https://perma.cc/8VYT-XHUC].

the well-established blue slip tradition for judicial nominations" to which she was committed.[65]

Furthermore, California and New Jersey Democratic senators have retained blue slips on nominees for appellate court vacancies in their states, but in these circumstances, Grassley has yet to set hearings. However, the Chair's application of the slip policy since November 2017 suggests that he will attempt to secure Democratic politicians' blue slips but will probably arrange hearings ultimately if the lawmakers keep slips and Grassley determines that the White House adequately consulted the home state senators.[66]

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65. Letter from Sen. Patty Murray to Sen. Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary (Oct. 22, 2018), https://assets.documentcloud.org/documents/5017920/Murray-Letter-to-Grassley-10-22-18.pdf [https://perma.cc/9ULR-XNTF].

66. *Nomination Hearing*, S. COMMITTEE ON JUDICIARY (Oct. 10, 2018), https://www.judiciary.senate.gov/meetings/10/10/2018/nominations [https://perma.cc/435S-QNJZ] (statement of Sen. Brown); Press Release, Sherrod Brown, Senator for Ohio, Brown Will Not Support Judge Nominees Who Worked to Strip Ohioans of Their Rights (June 8, 2018), https://www.brown.senate.gov/newsroom/press/release/brown-will-not-support-judge-nominees-who-worked-to-strip-ohioans-of-their-rights[https://perma.cc/RY83-38QF]; Jordain Carney, *Dem Senator Won't Return 'Blue Slip' for Two Trump Court Picks*, THE HILL (June 8, 2018, 1:02 PM EDT), https://thehill.com/blogs/floor-action/senate/391382-dem-senator-wont-return-blue-slip-for-two-trump-court-picks [https://perma.cc/W383-YJCS]; Thomas Kaplan, *Trump Is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES (July 31, 2018), https://www.nytimes.com/2018/07/31/us/politics/trump-judges.html [https://perma.cc/28TT-LR9U]; Agueda Pacheco-Flores, *Three Seattle Attorneys Nominated for Federal Judgeships, Appellate Court*, SEATTLE TIMES (July 13, 2018, 8:39 PM), https://www.seattletimes.com/seattle-news/3-seattle-attorneys-nominated-for-federal-judgeships-appellate-court [https://perma.cc/CE2S-87LK]; Sarah D. Wire, *California Senators Will Try to Block White House Judicial Nominees for the Ninth Circuit*, L.A. TIMES (Oct. 11, 2018), http://www.latimes.com/politics/la-na-pol-9th-circuit-nominees-20181011-story.html [https://perma.cc/7YYE-7Z2G]; Ed Whelan, *Senate Judiciary Committee Keeps Humming Along*, NAT'L REV.: BENCH MEMOS (Oct. 19, 2018), https://www.nationalreview.com/bench-memos/senate-judiciary-committee-keeps-humming-along [https://perma.cc/75HQ-BDRH] (predicting a November 14 hearing for the New Jersey nominee); *see supra* notes 43-48, 61, 63-67 and accompanying text (discussing Grassley's efforts to secure slips and set hearings for

III. BENEFITS AND DETRIMENTS OF BLUE SLIP RETENTION

Persuasive arguments confirm the advisability of maintaining the blue slip process, preferably as it was practiced across President Obama's tenure, as that was the most recent, relevant precedent. First, robust slip practice supplies protection for the minority and ensures that home state politicians—especially those who are not members of the chief executive's party—can substantively participate in nominations and confirmations. This regime distinctly assumed even more crucial importance with the recent evisceration of all nominee filibusters, perhaps the strongest tool that had protected the minority and, correspondingly, home state political figures and their constituents.

Ample senatorial courtesy, as promoted through blue slip use in nominating and appointing circuit and district court judges, could now be the last important safeguard for legislators and the public. Senators' participation effectively gives them a voice in the selection of local jurists, while it functions as a check on the President and the chamber majority by encouraging (1) the administration to consult, and reach consensus with, senators about candidates whom the President then nominates and (2) the majority to dutifully respect home state lawmakers' cogent perspectives on the nominees, who, if approved, will serve their jurisdictions.

For example, these politicians are more likely to appreciate the needs of their jurisdictions' courts, the electorate whom they represent, and the local legal culture, and the senators possess superior knowledge about the qualities that would make excellent judges in their states and of candidates who possess those qualifications. Senators are best positioned, if necessary, to stop Presidents from forcing the politicians and their constituents to accept nominees whose perspectives are incompatible with those of the senators or the constituents. Judicial appointments will most directly affect the people within the jurisdiction of the court, and those persons should be able to influence choices in nominees by requiring electoral accountability from their senators.

This protection has greater significance for appellate court vacancies than for district court vacancies, mainly because there are fewer appeals court positions. Moreover, appellate tribunals are courts of last resort for virtually all cases decided in U.S. federal courts, and their rulings pertain to

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Minnesota, Ohio, Oregon, Louisiana, Wisconsin, Pennsylvania, and Washington nominees whose home state senators retained blue slips after apparently determining that the White House had adequately consulted).

several states, unlike the decisions of district courts.[67] The safeguard of blue slips is particularly crucial to sparsely populated states; they experience fewer vacant appeals court positions, which typically materialize once in a generation, and each jurisdiction can have enhanced necessity for representation of the state's perspectives on the appellate courts.[68]

Blue slip practices, especially as deployed by contemporary Senates and Presidents, have generally operated in a constructive and equitable manner. The Judiciary Committee can smoothly implement blue slips. The panel merely has to retain the strictures which Democratic and Republican Chairs sustained during President Obama's administration: expeditiously scheduling panel hearings after both in-state politicians have tendered blue slips for circuit and trial court nominees. Fairness merits emphasis, as premising the slip regime's change on which party holds the Senate or presidency is not equitable and could substantially increase partisanship.

Blue slip application, as practiced in President Obama's tenure, can also impose disadvantages, which President Trump and other conservatives have amply criticized.[69] Particularly significantly, politicians could abuse slip purposes through injudicious use, especially for ideological, political, or partisan reasons. Abuse causes delay, can halt nominee processing, and may even convert the slip into a one-legislator

67. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2240-41 (2013); *see* Goldman et al., *supra* note 4, at 9; *supra* note 39 and accompanying text. They are also linked to specific states. *See infra* note 74.

68. *See Archive of Judicial Vacancies*, ADMIN. OFF. U.S. COURTS (2018), www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies [https://perma.cc/N48Q-DCZZ]. For example, the proposition that "California judges" and jurisprudence overwhelm smaller states in the Ninth Circuit informs the debate over splitting the appellate court, while senators who represent Ninth Circuit states other than California may be more attuned to their constituents. Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L. J. 1357, 1372 (1995); *see* 28 U.S.C. § 44(c) (2018); David Lat, *Circuit Court Nominees in the Trump Administration: The Latest News and Rumor (Part 1)*, ABOVE THE LAW (July 21, 2017), https://abovethelaw.com/2017/07/circuit-court-nominees-in-the-trump-administration-the-latest-news-and-rumor-part-1 [https://perma.cc/S4AK-2ECG]; *supra* note 38.

69. *See supra* notes 50-56 and accompanying text.

veto, thus perpetuating the counterproductive judicial selection dynamics recounted above.[70] In the worst-case scenario, a single politician might stop presidential appointments for the official's jurisdiction. President Trump and the GOP argue that the President is entitled to nominate and confirm selections who reflect his political views, especially when President Trump campaigned and was elected on a pledge to do so, because as many Republicans and Democrats recognize, "elections have consequences."[71] However, little persuasive evidence exists that Democratic members have abused blue slips in the Trump presidency as much as Republicans did throughout President Obama's administration.[72]

Accordingly, there is minimal need for effectuating the kinds of modifications in blue slip practices that Grassley has implemented or the comparatively dramatic alterations that numerous critics of blue slips have suggested. Even were there greater necessity for change, the measures that Grassley instituted apparently lack much efficacy. For instance, his regime leaves to one person's essentially unfettered discretion the interpretation and application of such ambiguous or malleable phrases as "adequate consultation," "exception," "significant factor," or "abuse," as Grassley's October 19, 2018 letter to the Washington senators and Senator Murray's deft response so trenchantly illustrate.[73]

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70. *See, e.g.*, *supra* Introduction and notes 16-25, 30-33. It contrasts with unanimous consent that allows cloture to treat what can become a one-senator veto. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 15-17 (R. XXII) (2013), https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf [https://perma.cc/7SD8-VK8U].

71. Press Release, White House, Office of the Press Sec'y, Fact Sheet: Doing What He Said He Would: President Trump's Transparent, Principled and Consistent Process for Choosing a Supreme Court Nominee (Jan. 31, 2017), https://www.whitehouse.gov/briefings-statements/said-president-trumps-transparent-principled-consistent-process-choosing-supreme-court-nominee [https://perma.cc/N77R-ZCT5]; Erwin Chemerinsky, *Many of Trump's Judiciary Picks Have No Business Being Judges. Can Senate Republicans Say No?*, SACRAMENTO BEE (Nov. 20, 2017), https://www.sacbee.com/opinion/california-forum/article185689663.html [https://perma.cc/Y4FH-JSXB].

72. *See supra* notes 40-47 and accompanying text.

73. *See supra* notes 57-60; *see* sources cited *supra* notes 64-65.

The argument for Grassley's treatment of appellate court vacancies is unpersuasive because, for the reasons canvassed above, states actually have *more* need for blue slip protection regarding court of appeals judgeships.[74]

In short, the advantages that blue slips currently offer eclipse the detriments. Insofar as the blue slip practice may carry some potential for abuse, the chamber should prevent this from arising by constantly remaining alert to that eventuality while installing efficacious checks on abuse.[75]

IV. SUGGESTIONS FOR THE FUTURE

A. Short-Term Suggestions

Over the near term, the Senate could easily maintain the policy that formerly governed blue slips. All that the Judiciary Committee needs to do is astutely continue the regime practiced across President Obama's eight years in office, which is the most relevant, recent precedent. That would be the fairest practice because the party controlling the White House and the Senate must comply with the same policy for slips.[76] The suggested

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74. *See supra* notes 39, 50, 59-60, 67-68 and accompanying text. Strong custom dictates that Presidents nominate candidates from the jurisdictions in which the circuit vacancies arise. Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2171-72, 2174, 2181, 2197-98 (2011); *see supra* notes 61-62 and accompanying text.

75. Kim, *supra* note 38. To date, Democrats have shown restraint, which seems to be the best check. *See supra* notes 40-45 and accompanying text. If they abuse slips more than the GOP did in the Clinton and Obama presidencies, Republicans could make exceptions. The GOP might also impose a "reasonable time" limit on how long senators might retain slips, but disparities in the size of nominees' records complicate this. *See supra* notes 9, 38-39 and accompanying text.

76. Jeffrey Toobin, *Will Democrats Lose Their Last Tool to Block Trump's Worst Judicial Nominees?*, NEW YORKER (Oct. 25, 2017), https://www.newyorker.com/news/daily-comment/will-democrats-lose-their-last-tool-to-block-trumps-worst-judicial-nominees [https://perma.cc/F4QT-Z77S]; Press Release, Senator Dianne Feinstein, Explaining the Senate's Blue Slip Process (Nov. 29, 2017),

approach dictates conducting hearings after each home state politician has returned slips for appellate and district court nominees. Because the mechanism was never codified in panel rules, which has apparently sown confusion and controversy partly because it has afforded the Chair extensive discretion, it would be advisable to craft written strictures ahead of the 2018 midterm elections, when the party that will secure the chamber is unclear. This action would increase clarity and consistency while precluding Democrats and Republicans from capturing inequitable advantage simply by virtue of political changes.

Part I scrutinized a number of approaches that both parties' Chairs applied to slips.[77] As discussed above, the leaders construed the procedure in ways that solidified partisan advantage, which divided or unified government seemingly explained.[78] The protocol followed in President Obama's tenure was the most salient, recent concept which Democratic and Republican Chairs practiced and was efficacious, so this possibility could function well over the short term.[79] Because the potential for abuse was the chief difficulty with that alternative, the rules should duly prescribe cures necessary to remedy or ameliorate it.[80]

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https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=FBE5B7DD-252F-4519-9336-1E42377DFC1D [https://perma.cc/LWJ7-U2NC]; sources cited *supra* note 40.

77. *See supra* notes 9-39 and accompanying text; *see also* Christina Pesavento, *Grassley Shouldn't Allow Senate Democrats to Block Judicial Nominees*, THE HILL (Aug. 11, 2017, 9:00 AM EDT), https://thehill.com/blogs/pundits-blog/the-judiciary/346095-grassley-must-not-allow-democrats-to-block-judicial-nominees [https://perma.cc/NS8F-8L7S].

78. *E.g.*, *supra* notes 9-12, 16-25, 31-32 and accompanying text; *see* Ryan J. Owens et al., *Ideology*, *Qualifications*, *and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347.

79. *See supra* notes 34-38 and accompanying text. *But see* Owens et al., *supra* note 78; Pesavento, *supra* note 77.

80. *See supra* page 11, *supra* note 73 and accompanying text. *But see supra* notes 40-47 and accompanying text..

B. Long-Term Suggestions

The blue slip is one mechanism within a larger toolbox that ensures protection of the Senate minority. For instance, the filibuster device actually could help eliminate or ameliorate the selection process' downward spiral, yet filibuster abuse has occasionally contributed to the deterioration of the process. Therefore, it appears preferable to develop a nuanced, bipartisan solution which addresses all of the discrete problems that contribute to dysfunction in the appointments process.

It is essential to recalibrate the filibuster, which has proved instrumental to the "confirmation wars."[81] The technique had long safeguarded the minority party, but GOP filibuster abuse prompted Democrats to constrict it with the 2013 nuclear option, although this measure proved to be overly stringent.[82] Thus, the construct warrants revitalized, albeit confined, application. For example, deployment may be restricted to nominees who lack the diligence, intelligence, temperament, ethics, or independence for providing excellent service on the bench. This might be realized through permitting filibusters only in "extraordinary circumstances," a system that operated well across 2005, while clearly defining the precept.[83] Several legislators argued that ideological

81. Bob Bauer, *How to End the Judicial Confirmation Wars*, ATLANTIC (July 1, 2018), https://www.theatlantic.com./politics/archive/2018/07/how-to-end-the-judicial-confirmation-wars/564188 [https://perma.cc/Z99P-SW7Z]; Benjamin Wittes, *The Confirmation Wars Are Over*, ATLANTIC (Aug. 14, 2018), https://www.theatlantic.com/ideas/archive/2018/08/the-polarization-contagion/567422 [https://perma.cc/7E44-3QBA].

82. Mandating a majority, not sixty votes, for cloture eviscerated filibusters as protection for the minority. *See infra* note 84; *see also* Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L.J. 121 (2015); Jeffrey Toobin, *Can Merrick Garland Kill the Filibuster?*, NEW YORKER (Mar. 25, 2016), https://www.newyorker.com/news/daily-comment/can-merrick-garland-kill-the-filibuster [https://perma.cc/K428-38B5].

83. *Text of Senate Compromise on Nominations of Judges*, N.Y. TIMES (May 24, 2005), http://www.nytimes.com/2005/05/24/politics/24text.html [https://perma.cc/XQ4H-U8A8]; *see* Michael Gerhardt & Richard Painter, "*Extraordinary Circumstances*": *The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, 46 U. RICH. L. REV. 969 (2012); Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303 (2011).

perspectives and the size of a court's docket and judicial complement were not extraordinary circumstances in addressing the 2013 controversy about conducting floor debates and ballots on multiple United States Court of Appeals for the District of Columbia Circuit nominees.[84] The adjustments envisioned would seemingly promote reinstitution of the sixty-vote mandate for cloture, a determination that will reverse the nuclear option and promises to facilitate significantly greater party collaboration.[85]

Lawmakers should astutely combine the ideas proffered above with legislation which directly authorizes fifty-seven circuit and district judgeships that the Judicial Conference, the policymaking arm of the federal courts, suggested to Congress.[86] This endeavor might inaugurate a

84. Tobias, *supra* note 82, at 126-28. *But see id*. at 125-27. Ideology's proper role is contested. Both parties premise blue slip and filibuster deployment on ideology, but GOP use was most extreme throughout President Obama's years in office. *See supra* notes 44 and 74. Moreover, President Trump and the Republican leadership have expressly made ideology a critically important constituent of their judicial nomination and confirmation processes as well as "weaponized" the federal courts, especially the Supreme Court, by making judicial appointments to those courts the foremost argument for voting Republican in the 2018 midterm elections. Jordain Carney, *GOP Plays Hardball in Race to Confirm Trump's Court Picks*, THE HILL (Oct. 19, 2018, 6:00 AM EDT), https://thehill.com/homenews/senate/412145-gop-plays-hardball-in-race-to-confirm-trumps-court-picks [https://perma.cc/9BAZ-PUZQ]; Burgess Everett & Elana Schor, *McConnell's Laser Focus on Transforming the Judiciary*, POLITICO (Oct. 17, 2018), https://www.politico.com/story/2018/10/17/senate-gop-judges-911935 [https://perma.cc/UU9V-4XTT]; Gabriel Pogrund & Elise Viebeck, *Trump Celebrates McConnell, Federal Judicial Appointments at Kentucky Rally*, WASH. POST (Oct. 13, 2018), https://www.washingtonpost.com/politics/trump-celebrates-mcconnell-federal-judicial-appointments-at-kentucky-rally/2018/10/13/db3ad41a-ce33-11e8-a360-85875bac0b1f_story.html [https://perma.cc/BH8Q-AT9B].

85. Republican senators would be required to cooperate more in appointing judges. Tobias, *supra* note 82, at 140.

86. The Conference premises judgeship recommendations for Congress on conservative work and case load empirical data. *Report of the Proceedings of the Judicial Conference of the United States*, JUD. CONF. U.S. 16-17 (Mar. 14, 2017), http://www.uscourts.gov/sites/default/files/2017-03_0.pdf

bipartisan judiciary, which enables the party that lacks administration control to recommend a specific percentage of nominees.[87] The best time for agreeing on the solution would be in a presidential election year when it would be unknown which party was going to capture the White House and the Senate.

The concepts proposed would yield benefits. They will slow the appointments process's subversion by decreasing rampant partisanship. The constructs would supply both parties with incentives to cooperate, to appoint jurists who can be diverse vis-à-vis experience, ideology, ethnicity, gender, and sexual orientation, and to grant the courts necessary judicial resources.[88] If Congress adopts most of those proposals during 2020, that timing would stop the parties from capitalizing on the scheme's alteration for partisan gain. The suggestions would realize a measure of parity between Democrats and Republicans. For example, GOP concern involving the nuclear option's 2013 detonation, which essentially allowed President Obama to marshal ninety confirmations the subsequent year, was practically offset by his mere twenty appointments in 2015-2016, which left President Trump with 105 vacancies to fill at his inauguration.[89] This

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[https://perma.cc/685F-ZLQB]; *see* Steven G. Calabresi & Shams Hirji, *Proposed Judgeship Bill* (Northwestern Univ. Pritzker Sch. of L. Pub. L. & Legal Theory Series, Paper No. 17-24), https://thinkprogress.org/wp-content/uploads/2017/11/calabresi-court-packing-memo.pdf [https://perma.cc/24BA-ZHHB] (tendering a proposal that would drastically expand appellate and district court judgeships).

87. Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L.J. ONLINE 2051, 2056 (2016).

88. *Id.* at 2058; *see* Kevin R. Johnson, *How Political Ideology Undermines Racial and Gender Diversity in Federal Judicial Selection*, 2017 WIS. L. REV. 345; Lat, *supra* note 52.

89. *E.g.*, *Archive of Judicial Vacancies*, *supra* note 68; Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9 (2017); Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12 (2016); Barnes, *supra* note 38; Everett, *supra* note 49; Editorial, *supra* note 50.

rough equivalence and the devices contemplated should reduce incessant paybacks, a major judicial selection predicament.[90]

Finally, the survey in Part I demonstrates that both parties have changed blue slips for partisan benefit regarding appointments.[91] Because this circumstance and the dearth of written strictures have provoked confusion and disputes, lawmakers need to embody slip procedures in the committee rules. That approach might increase clarity and consistency and should keep the parties from securing unfair advantage through political changes.[92]

CONCLUSION

Blue slips have furnished valuable protection to the Senate minority and to politicians in states that encounter judicial vacancies. Thus, Democratic and Republican party members should follow recent slip procedures deployed in President Obama's years and codify them in the panel rules. In the near term, this effort should ameliorate the systematic partisanship and downward-spiraling process that characterize judicial selection. In the longer term, the Senate must institute more substantial change, namely a bipartisan judiciary, to rectify the strident partisanship which infects the selection process.

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90. Compelling was 2015-16 approval of merely two circuit judges, the fewest since 1897-98, when the appellate courts had only twenty-five judgeships. Christopher Kang, *Republican Obstruction of Courts Could Be the Worst Record Since the 1800s*, HUFFINGTON POST (Apr. 21, 2016), https://www.huffingtonpost.com/christopher-kang/republican-obstruction-of_b_9741446.html [https://perma.cc/5YHH-HFUJ].

91. *See supra* notes 9-40, 44, 80, 83 and accompanying text; *see also* Voruganti, *Strategic Error*, *supra* note 39 (showing how the GOP asymmetrically invoked blue slips for strategic benefit).

92. *See* Denning, *supra* note 1, at 100 (explaining the written rule's benefits and costs); STANDING RULES OF THE SENATE, *supra* note 70 (amendment of Senate Rule XXII would institute the filibuster change proposed above).