

# “Hit the Road, Blue Slips”: Eliminating Senate Obstructionism of Federal Judicial Appointments

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*“Simply put, there shouldn’t be one set of rules for . . . Republican nominees under a Republican president and a different set for nominees under a Democratic president.”<sup>1</sup>*

— Dick Durbin, U.S. Senator, Majority Whip and  
Chair of the Senate Judiciary Committee, 2021

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<sup>1</sup> *Nominations: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (Jan. 12, 2022) (statement of Chair Dick Durbin at 07:06–07:17), <https://www.judiciary.senate.gov/meetings/01/05/2022/nominations> [<https://perma.cc/XZ49-BAAB>].

## INTRODUCTION

In America, the law is used to protect our society's general safety and to "ensure our rights as citizens against abuses by other people, by organizations, and by the government itself."<sup>2</sup> Federal judges are integral to ensuring equal justice under the law.<sup>3</sup> Under Article III of the Constitution, federal judges are appointed for a life term, which was intended to insulate the judiciary "from the political pressures the executive and legislative branches could exert."<sup>4</sup> Over 400,000 cases were filed in federal district and circuit courts last year.<sup>5</sup> When there are an insufficient number of judges to handle the workload, the resolution of these important cases is delayed. The President and Congress have a shared responsibility to authorize enough "federal judgeships to handle the workload of the federal courts in an impartial, just, and timely manner."<sup>6</sup> The Appointments Clause of the Constitution grants the President power to nominate and appoint federal judges with "Advice and Consent of the Senate."<sup>7</sup> Advice has customarily been provided through a tool called a "blue slip."<sup>8</sup>

Traditionally, blue slips have operated as an informal way to give senators an opportunity to provide meaningful consultation on lifetime judicial appointments made by the President within their home states. Blue slips offer home state senators the option to endorse or object to the President's judicial nomination to "ensur[e] that nominees are mainstream and well-suited to

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<sup>2</sup> *Law and the Rule of Law*, JUD. LEARNING CTR., <https://judiciallearningcenter.org/law-and-the-rule-of-law/> [<https://perma.cc/UL9W-ABLA>] (last visited Mar. 9, 2023).

<sup>3</sup> *See About Federal Judges*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/judges-judgeships/about-federal-judges> [<https://perma.cc/E5TB-UMM2>] (last visited Mar. 9, 2023).

<sup>4</sup> *Pop Civ 13: Lifetime Appointments for Supreme Court Justices*, J. MARSHALL CTR., <https://johnmarshallcenter.org/pop-civ-13-supreme-court-lifetime-appointments/> [<https://perma.cc/6JBT-URMJ>] (last visited Mar. 9, 2023); U.S. CONST. art. III, § 1.

<sup>5</sup> *Judicial Vacancies*, A.B.A. (Dec. 9, 2022), [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/independence\\_of\\_the\\_judiciary/judicial\\_vacancies/](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/judicial_vacancies/) [<https://perma.cc/H28M-KP45>]; *see also* ADMIN. OFF. OF THE U.S. CTS., FEDERAL JUDICIAL CASELOAD STATISTICS 2021, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021> [<https://perma.cc/WZL9-G2D6>] (last visited Nov. 4, 2022) ("In accordance with 28 U.S.C. § 604(a)(2), each year the Administrative Office of the United States Courts is required to provide a report of statistical information on the caseload of the federal courts for the 12-month period ending March 31.").

<sup>6</sup> A.B.A., *supra* note 5.

<sup>7</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>8</sup> *See What Is a Blue Slip?*, S. COMM. ON THE JUDICIARY, <https://www.judiciary.senate.gov/nominations/blueslip> [<https://perma.cc/PE8T-KK6F>] (last visited Feb. 25, 2022) (noting that blue slips provide "meaning to the 'advice' prong of the Senate's constitutional role").

serve in their states.”<sup>9</sup> Over time, changes to the blue slip policy allowed for the political party in control of the Senate to use blue slips as a mini filibuster to veto the President’s nominees: home state senators could either submit negative blue slips or fail to return them, thereby blocking the Senate Judiciary Committee from any further consideration of that judicial candidate.<sup>10</sup>

The role of the blue slip in the nomination and confirmation process presented an issue of considerable debate during the Trump Administration. While both parties have abused the process in the past,<sup>11</sup> contemporary tensions can be traced back to two Republican policy modifications to aggressively appoint right-wing judges to the federal bench. First, Republicans quite often refused to turn over blue slips for district court nominees during the Obama years, which resulted in several of the President’s nominees never getting confirmed.<sup>12</sup> Second, Trump-era Republicans—who held majority power in the Senate—took advantage of the blue slip process by eliminating the blue slip requirement for courts of appeals nominees to facilitate and speed up the process of nominating judges.<sup>13</sup>

Tensions are flared at the Senate today due to extreme partisanship. While many Democrats believe Republicans politicized the courts beyond the point of no return,<sup>14</sup> many Republicans fundamentally do not believe Democrats

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<sup>9</sup> *Explaining the Senate’s Blue Slip Process*, S. COMM. ON THE JUDICIARY (Nov. 29, 2017), <https://www.judiciary.senate.gov/press/dem/releases/explaining-the-senates-blue-slip-process> [<https://perma.cc/M4KQ-25FT>].

<sup>10</sup> See *infra* Section II.B.

<sup>11</sup> See Jonathan Turley, Opinion, *Time for Congress to End the Abusive ‘Blue Slipping’ Process*, THE HILL (Nov. 14, 2017, 4:00 PM), <https://thehill.com/opinion/judiciary/360328-time-for-chuck-grassley-to-end-the-abusive-blue-slip-nominee-system/> [<https://perma.cc/FS29-EPQZ>].

<sup>12</sup> See Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump—What Has He Done With Them?*, BROOKINGS INST. (June 4, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump/> [<https://perma.cc/W2HD-HSQ6>]; 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/5P75-EBRL>]; Burgess Everett & Seung Min Kim, *Judge Not: GOP Blocks Dozens of Obama Court Picks*, POLITICO (July 6, 2015, 8:08 PM), <https://www.politico.com/story/2015/07/payback-gop-blocks-obama-judge-picks-judiciary-119743> [<https://perma.cc/WCZ3-NCDZ>].

<sup>13</sup> See Bob Egelko, *U.S. Senate Judiciary Chair to Retain GOP’s ‘Blue Slip’ System of Selecting Some Judges*, S.F. CHRON. (Feb. 18, 2021), <https://www.sfchronicle.com/nation/article/U-S-Senate-judiciary-chair-to-retain-GOP-s-15961370.php>.

<sup>14</sup> See Andrew Breiner, *How Did the Courts Become So Politicized?*, LIBR. OF CONG. (Sept. 21, 2021), <https://blogs.loc.gov/kluge/2021/09/how-did-the-courts-become-so-politicized/>

have a legitimate right to govern, and do not think Black and brown people, nor public defenders, belong on the bench.<sup>15</sup> Much to the dismay of Republicans, Democrats are following in their footsteps, wielding their majority power to advance judicial appeals court nominations without Republican lawmakers' home state approval.<sup>16</sup> For example, in March 2022, Ariana Freeman,<sup>17</sup> whom Biden nominated to serve as a judge on the Third

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[<https://perma.cc/GXK8-XVUW>] (“Democrats would blame the Republican refusal to consider then-President Barack Obama’s 2016 nominee, Merrick Garland, allowing President Donald Trump to appoint Neil Gorsuch once he got into office the next year.”); Albert Hunt, Opinion, *Republicans Should Know About Politicizing the Supreme Court—They Did It*, THE HILL (Apr. 3, 2022, 11:00 AM), <https://thehill.com/opinion/judiciary/3257552-republicans-should-know-about-politicizing-the-supreme-court-they-did-it/> [<https://perma.cc/TJ5F-ZSEB>] (“While both sides have contributed to this sentiment, the burden of blame over the past two decades rests with Republicans.”).

<sup>15</sup> Compare the racially coded language Republican Senators used to question Justice Ketanji Brown Jackson with similar language used to grill Constance Baker Motley in 1966. See Sharon Wright Austin, *Republican Senators Used Racially Coded Language to Question Ketanji Brown Jackson. There’s History to That.*, WASH. POST (Mar. 29, 2022, 5:00 AM), <https://www.washingtonpost.com/politics/2022/03/29/kbj-race-senate-hearings-supreme-court/>; John Gramlich, *Black Women Account For a Small Fraction of the Federal Judges Who Have Served to Date*, PEW RSCH. CTR. (Feb. 2, 2022), <https://www.pewresearch.org/fact-tank/2022/02/02/black-women-account-for-a-small-fraction-of-the-federal-judges-who-have-served-to-date/> (“Republican presidents have generally been less likely than Democratic presidents to appoint federal judges who are women or racial and ethnic minorities.”); Madison Alder, *GOP Criticism of Defender Judicial Picks Rebutted by Law Groups*, BLOOMBERG LAW (July 14, 2021, 2:28 PM), <https://news.bloomberglaw.com/us-law-week/gop-criticism-of-defender-judicial-picks-rebutted-by-law-groups> (“Republicans have cast [public] defender experience as something to be concerned about.”).

<sup>16</sup> See Todd Ruger, *Republicans Stung by a Change They Made on Judicial Picks*, ROLL CALL (Jan. 12, 2022, 11:08 AM), <https://rollcall.com/2022/01/12/republicans-stung-by-a-change-they-made-on-judicial-picks/> [<https://perma.cc/P32J-9FV2>]; Carl Hulse, *Durbin, New Judiciary Chair, Warns Republicans on Blocking Judges*, N.Y. TIMES (Mar. 1, 2021), <https://www.nytimes.com/2021/03/01/us/politics/durbin-senate-judiciary-garland.html> (“Offering a warning to Republicans on judges, Mr. Durbin said he would reserve the right to end their ability to block district court nominees through the arcane ‘blue slip’ process — which allows senators to bless or blackball nominees from their home states — if he concluded that they were obstructing nominations without legitimate grounds.”); Marianne Levine, *Senate Dems Take a Page from GOP in Judicial Nominee Battles*, POLITICO (Feb. 17, 2021, 5:38 PM), <https://www.politico.com/news/2021/02/17/court-nominees-democrats-469500> [<https://perma.cc/2V6W-EJPW>].

<sup>17</sup> Arianna Freeman was the managing attorney at the Federal Community Defender Office in the Eastern District of Pennsylvania, where she had worked for more than a decade. See Jonathan Tamari, *Senate Confirms Arianna Freeman to US Court of Appeals for the Third*

Circuit, appeared before the U.S. Senate Judiciary Committee in Washington, D.C.<sup>18</sup> Senator Pat Toomey, a Republican from Pennsylvania, did not return his blue slip, signaling his disapproval of Freeman's nomination.<sup>19</sup> But Toomey's support was unnecessary because Democratic Committee Chairman, Dick Durbin of Illinois, "has been following a policy GOP senators adopted in the Trump era of not requiring 'blue slips' for circuit court picks."<sup>20</sup> Toomey's disapproval of Freeman, among other Republicans, facially stemmed from her work as a court-appointed defense lawyer;<sup>21</sup> but underlyingly, Republicans have opposed candidates like Freeman because they represent a distinctive archetype from past nominees. Freeman represents a trend in nominees Biden has pushed to increase the racial and gender diversity on the federal bench and to draw nominees from beyond the traditional pool of lawyers from big law firms and prosecutor offices.<sup>22</sup> Freeman "will be the first woman of color to serve as a judge on the Third Circuit and is President Joe Biden's first nominee to be confirmed to that appellate court."<sup>23</sup>

The 2022 mid-term election has come and gone, along with concerns about whether Democrats would keep a majority in the Senate, which

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*Circuit, the First Woman of Color to Join That Bench*, PHILA. INQUIRER (Sept. 29, 2022), <https://www.inquirer.com/politics/nation/arianna-freeman-third-circuit-confirmation-public-defender-20220929.html&outputType=app-web-view> [<https://perma.cc/LQ3Q-JXWV>]; James Arkin, *Freeman to Join 3rd Circ. After Prior Confirmation Misstep*, LAW360 (Sept. 29, 2022), <https://www.law360.com/articles/1535223>.

<sup>18</sup> See Nate Raymond, *Senate Panel Deadlocks on 3rd Circuit Nominee Arianna Freeman*, REUTERS (Apr. 4, 2022, 7:20 PM), <https://www.reuters.com/legal/litigation/senate-panel-deadlocks-3rd-circuit-nominee-arianna-freeman-2022-04-04/>.

<sup>19</sup> Arkin, *supra* note 17.

<sup>20</sup> Raymond, *supra* note 18.

<sup>21</sup> See Nate Raymond & Mike Scarcella, *U.S. Appeals Court Nominee Freeman Fails in Rare Setback*, REUTERS (Sept. 13, 2022), <https://www.reuters.com/legal/government/us-appeals-court-nominee-freeman-fails-rare-setback-2022-09-13/>.

<sup>22</sup> See Arkin, *supra* note 17; Tierney Sneed, *Inside Democrats' Quest to Nominate Judges Who Break the Ex-Prosecutor Mold*, CNN (July 30, 2021, 4:15 PM), <https://www.cnn.com/2021/07/28/politics/biden-judicial-nominations-public-defenders-professional-diversity/index.html> [<https://perma.cc/TG9C-3HRW>] ("President Joe Biden is on a mission to pick judges whose professional backgrounds break the mold of the ex-prosecutor and corporate law veterans who currently dominate the federal judiciary."); Brian Fallon & Christopher Kang, *No More Corporate Lawyers on the Federal Bench*, ATLANTIC (Aug. 21, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/no-more-corporate-judges/596383/> ("Republicans often elevate [corporate] lawyers for their proven ability to promote corporate interests. For Democrats, there are certain political upsides to these types of nominees as well: Their work as corporate lawyers can help project a moderate image and deflect criticism from the pro-business Republicans who vote on their confirmations.").

<sup>23</sup> Arkin, *supra* note 17.

prompted a slew of judicial nominations.<sup>24</sup> The fear was that if Republicans regained control of the Senate, they might amend the blue slip policy to block President Biden's nominees.<sup>25</sup> Even without a Senate majority, Republicans have made it difficult for President Biden to appoint federal judges in district court seats that have vacancies in states with two Republican senators—while there have been thirty-seven vacancies, only one seat has been filled.<sup>26</sup> As Republicans are threatening to withhold blue slips for President Biden's district court nominees, the question of *whether the blue slip process should exist* gains greater significance each day. Part I describes the history behind the selection of federal judges and the role blue slips have played over time. Part II explains how blue slips have been manipulated to slow or frustrate the federal appointment process. Finally, Part III recommends eliminating the blue slip policy and argues for alternatives minority political parties can pursue to influence the President's selection of judges.

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<sup>24</sup> See Tierney Sneed, 'As Many as Possible, as Soon as Possible': Democrats Scramble to Confirm Biden's Judicial Nominees Before November, CNN (Apr. 4, 2022), <https://www.cnn.com/2022/04/04/politics/biden-lower-court-nominations> [https://perma.cc/M3SY-2VYD]; Nate Raymond & Mike Scarcella, *Senate Democrats Continue Rush of Judicial Votes With 9th Circuit Appointment*, REUTERS (Sept. 12, 2022, 7:02 PM), <https://www.reuters.com/legal/government/senate-democrats-continue-rush-judicial-votes-with-9th-circuit-appointment-2022-09-12/>; Marianne Levine, *Senate Prepares to Pick up the Judicial-Pick Pace as November Looms*, POLITICO (Aug. 22, 2022, 4:30 AM), <https://www.politico.com/news/2022/08/22/senate-prepares-judicial-pick-pace-00052402> [https://perma.cc/LB9C-J7BN]; Scott Simon, *President Biden Is Replacing Federal Judges at a Record-Breaking Pace*, NPR (Jan. 22, 2022, 8:02 AM), <https://www.npr.org/2022/01/22/1075049532/president-biden-is-replacing-federal-judges-at-a-record-breaking-pace> [https://perma.cc/9W8Y-HLP2].

<sup>25</sup> See Amber Phillips, *What Happens if Republicans Take the House, Senate (or Both) in 2023?*, WASH. POST (Oct. 2, 2022, 11:13 AM), <https://www.washingtonpost.com/politics/2022/10/02/house-senate-control-2022-outcomes/> ("A Republican Senate would slow down or even block many of Biden's picks to be federal judges.").

<sup>26</sup> Miles Mogulescu, *A Democratic Judicial Makeover Depends on Blue Slips*, AM. PROSPECT (Dec. 8, 2022), <https://prospect.org/politics/democratic-judicial-makeover-depends-on-blue-slips/> [https://perma.cc/3HQ3-HZPA].

## I. THE VEXED HISTORY OF JUDICIAL APPOINTMENTS

History reminds us that the power associated with federal judicial appointments has been a long-standing subject of debate since America's origin. First, this Part explores the legal authority the Constitution confers to the President and the Senate to nominate and appoint members of the federal bench. Then, this Part turns to today's federal judicial selections process to underscore the burden blue slips levy on time, citizen advocacy, and etiquette of Senate procedure.

### A. THE DEBATE OVER APPOINTMENT POWER PRECEDING BLUE SLIPS

Today, and perhaps throughout its existence, blue slips epitomize a question that has been debated since the framing of America's Constitution: *who has the power and influence to appoint nominees to the federal bench?* The descriptive answer—the President—and the normative reality—a home state senator's acquiescence or filibustering—sway the opinions of legal stalwarts due to the politicization of the process: appointments depend on which party has collective congressional and executive control. But politics came later; the deliberation began much differently.

Spirited debates between Federalists and anti-Federalists about appointment power served as a highly contentious topic at the Constitutional Convention of 1787. The Framers believed they needed to uphold liberty by preventing excessive executive power to preserve governmental equality between the departments.<sup>27</sup> Hence came the principle, “[l]iberty requires accountability,”<sup>28</sup> a foundational precept that enlivens the Appointments Clause of Article II.<sup>29</sup> The Founders were concerned about power concentrated in the controlling few.<sup>30</sup> Instead, they desired a different framework that required “accountability to the political will of citizenry.”<sup>31</sup>

In the Declaration of Independence, Thomas Jefferson underscored *judicial independence*—jurists and jurisprudence free from government or public coercion and corruption—as a core grievance the King failed to

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<sup>27</sup> See Michael A. Sabino, “Liberty Requires Accountability”: *The Appointments Clause, Lucia v. SEC, and the Next Constitutional Controversy*, 11 WM. & MARY BUS. L. REV. 173, 181 (2019).

<sup>28</sup> *Id.*; *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring).

<sup>29</sup> See Sabino, *supra* note 27, at 181–84.

<sup>30</sup> *Ass’n of Am. R.R.*, 135 S. Ct. at 1244.

<sup>31</sup> See Sabino, *supra* note 26, at 181.

address.<sup>32</sup> James Madison and Alexander Hamilton expanded on this idea during the Constitutional Convention and in the *Federalist Papers* thereafter, lobbying for distributed power between the Senate and the Executive Branch.<sup>33</sup> Subsequently, lengthy debates, various interests, and urgency for a united government led to a compromise: the President and the Senate sharing appointment power.<sup>34</sup>

The Appointments Clause discussion took place in early September at the Convention. After days of vetting both the “New Jersey Plan”<sup>35</sup> and the “Virginia Plan,”<sup>36</sup> James Madison brokered the blueprint for compromise, and Alexander Hamilton delivered the Appointments Clause’s final

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<sup>32</sup> THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (“[The King] has made Judges dependent upon his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”); see WILLIAM FRANKLIN WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 355 (1929); EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 3 (1944).

<sup>33</sup> THE FEDERALIST NO. 51 (James Madison) (noting that each of the branches, including the judiciary, would and “should have a will of its own”). Hamilton argued that we could trust federal judges to stay within their limits, but only if they were truly independent. He argued that only an independent judicial branch of government would be able to impartially check an excessive exercise of power by the other branches of government. See THE FEDERALIST NO. 78 (Alexander Hamilton) (“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.”).

<sup>34</sup> See DAVID M. O’BRIEN, JUDICIAL ROULETTE 29–32 (1988) (“James Madison sought compromise.”).

<sup>35</sup> *Id.* at 30. The New Jersey Plan sought appointments by an executive elected by the legislature. *Id.* Alexander Hamilton suggested that judges “be appointed or nominated by the Executive to the Senate, which should have the right of rejection or approving.” *Id.* (internal quotations omitted). Hamilton’s was “the first suggestion of a method that would eventually find its way into the Constitution” but lacked support when initially proposed. *Id.*

<sup>36</sup> *Id.* at 29–30. Delegates at Philadelphia considered giving Congress “the power to choose an executive and members of the federal judiciary.” *Id.* at 29. “Pennsylvania’s delegate James Wilson objected, arguing that ‘experience showed the impropriety of such appointments by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences.’” *Id.* at 29–30. On the other hand, Wilson “believed that vesting power in the executive—‘a single responsible person’—was more prudent. John Rutledge of South Carolina was not ‘disposed to grant so great a power to any single person.’” He believed the people would think that the Framers were “leaning too much toward Monarchy.” *Id.* at 30 (internal quotations omitted).



writings.<sup>37</sup> A Special Committee on Postponed Matters triggered a final debate where Alexander Hamilton presented the strongest arguments for the appointment process in *The Federalist*:

It will be the office of the President to NOMINATE, and, with the advice and consent of the Senate, to APPOINT. There will, of course, be no exertion of CHOICE on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves CHOOSE, they can only ratify or reject the choice of the President. [The Senate] might even entertain a preference to some other person, at the very moment they were assenting to the one proposed, because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen, that the majority of the Senate would feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire, and the proofs of the want of it destroy.<sup>38</sup>

The Committee decided that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States.”<sup>39</sup> While the Framers conferred the President with the power to “nominate, and . . . appoint” members of the federal bench, they also prescribed power to the Senate to provide “[a]dvice and [c]onsent” as a safeguard to protect states’ local interests.<sup>40</sup> The text suggests Federalists sought to empower the President

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<sup>37</sup> “Alexander Hamilton’s arguments in the *Federalist Papers*, which ‘contain the most thorough contemporary justification for the method of appointing principal officers that the Framers adopted,’ stressed that placing the appointment power with a single individual, rather than a multi-member body, ensured a measure of accountability for those appointments.” *Historical Background on Appointments Clause*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/artII-S2-C2-3-2/ALDE\\_00013093/#ALDF\\_00018606](https://constitution.congress.gov/browse/essay/artII-S2-C2-3-2/ALDE_00013093/#ALDF_00018606) (quoting *Weiss v. United States*, 510 U.S. 163, 185 n.1 (1994) (Souter, J., Concurring)); see also THE FEDERALIST NO. 76 (Alexander Hamilton) (“I proceed to lay it down as a rule, that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment.”).

<sup>38</sup> THE FEDERALIST NO. 66 (Alexander Hamilton).

<sup>39</sup> U.S. CONST. art. II, § 2; see also ROBERT YATES, SECRET PROCEEDINGS OF THE FEDERAL CONVENTION 146–47, 280–81 (1839) (blending the Virginia and New Jersey plans, Hamilton delivered sentiments leading to creation of the Appointments Clause); see Richard Henry Lee, *Letters from the Federal Farmer to the Republican XIII*, LEE FAM. DIGIT. ARCHIVE, <https://leefamilyarchive.org/papers/essays/fedfarmer/13.html> [<https://perma.cc/8BHG-WXLT>] (noting that art. II, § 2 included appointment power over inferior courts).

<sup>40</sup> U.S. CONST. art. II, § 2.

because they viewed senatorial participation as potentially pernicious. Conversely, anti-Federalists sought to maintain state power and influence but feared that a new national government might create the potential for Presidents to conspire with senators to bias the courts towards mutual interests. One thing the Framers did not anticipate from the outset was the degree to which partisanship would rise along with political patronage that would impact the process for judicial nominations. Unbeknownst to the Framers at the time, the evolution of politics would harvest the Senate's power to use blue slips to shape the federal judiciary by rejecting the President's judicial nominees.

#### B. THE FEDERAL JUDICIAL SELECTIONS PROCESS TODAY

Senators have always played a role in the selection of judges. However, the President's selection of nominees and the Senate's confirmation of members to the federal bench has become a highly politicized process. The blue slip serves as a mechanism for pre-nomination consultation to take place to ease the process once nominees are put before the Senate Judiciary Committee. This Section outlines the appointment process and the role of blue slips.

##### 1. Important Stages of the Judicial Appointment Process

The appointment process is initiated when a vacancy occurs on the federal bench. A vacancy occurs on three occasions: (1) when a judge desires a lower caseload and decides to step down as an "active judge" to opt for "senior status," (2) by retiring, or (3) by death.<sup>41</sup> Because Americans rely on federal courts to resolve cases and controversies, timely replacement of federal judges requires an expedient vetting of potential candidates.<sup>42</sup> Before the White House identifies candidates preferred by the President, it usually

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<sup>41</sup> See U.S. CTS., *supra* note 3. Article III judges must serve at least ten years before taking on senior status: senior judges are at least sixty-five years old and must have served fifteen years on the bench, or any combination that equals eighty. *Id.* Federal judges typically provide a one-year advanced notice to a federal district or circuit court of when they plan to take senior status. See Nan Aron, Adjunct Professor of L., Geo. Univ. L. Ctr., Judicial Selection Process and Reforming the Supreme Court Seminar Class Lecture: Selection Process of Lower Court Judges (Jan. 31, 2022) (on file with author).

<sup>42</sup> See BARRY J. McMILLION, CONG. RSCH. SERV., R43316, LENGTH OF TIME FROM NOMINATION TO CONFIRMATION FOR U.S. CIRCUIT AND DISTRICT COURT NOMINEES: OVERVIEW AND POLICY OPTIONS TO SHORTEN THE PROCESS 8, 10 n.41 (2013).

consults home state senators for input on conceivable candidates to fill the vacancy.<sup>43</sup>

Home state senators typically take one of three avenues to recommend candidates to the White House: (1) exhaustively searching the state bar for candidates; (2) building selection committees composed of the state's leading attorneys to identify top jurists in the state; or (3) relying on patronage, cronyism, or nepotism—softly promising the job to supporters as a reward for a victory or as an incentive to keep working in support of common interests.<sup>44</sup> Typically, a senator belonging to the President's political party identifies candidates for the President to nominate, either to federal district courts in their states or federal circuit court judgeships associated with a state.<sup>45</sup> In most circumstances, but not all, the President yields deference to his party's home state senators because senators' preferred judicial candidates ideally embody similar values that would lead to the selection of a similar candidate.<sup>46</sup> Sometimes, senators from states opposed to the President's political party receive no communication from the White House. This often likely stems from the President's expectation that non-party senators will unreasonably object to any candidate offered to fill a judicial vacancy, due to partisanship and an inability to reach across the aisle to make appointment concessions.

For example, in January 2022, Senators Marsha Blackburn and Bill Hagerty, Republicans from Tennessee, complained because “[they were] not consulted” about their objections to Sixth Circuit nominee Andre Mathis.<sup>47</sup>

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<sup>43</sup> See DENIS STEVEN RUTKUS, CONG. RSCH. SERV., RL34405, *ROLE OF HOME STATE SENATORS IN THE SELECTION OF LOWER FEDERAL COURT JUDGES* 4 (2013).

<sup>44</sup> See *Federal Judicial Nominations: 9 Steps from Vacancy to Confirmation*, CTR. FOR AM. PROGRESS (Jan. 29, 2013), <https://www.americanprogress.org/article/federal-judicial-nominations-9-steps-from-vacancy-to-confirmation/> [<https://perma.cc/6UQG-ECCZ>]; Nan Aron, Adjunct Professor of L., Geo. Univ. L. Ctr., *Judicial Selection Process and Reforming the Supreme Court Seminar Class Lecture: Selection Process of Lower Court Judges* (Apr. 4, 2022) (on file with author).

<sup>45</sup> See RUTKUS, *supra* note 43, at 13. The President usually defers to home state senators of their party for district court nominees. Although the White House might take home states senators' recommendations into consideration, court of appeals nominees are typically left to the White House for the President's patronage. *Id.* at 22.

<sup>46</sup> See *id.* at 4–9. Diversity has been a big push for the Biden Administration, and therefore, President Biden and Democratic home state senators have not been as focused on pure political patronage as have previous administrations. See Elena Mejia & Amelia Thomson-DeVeaux, *How Biden is Reshaping the Courts*, FIVETHIRTYEIGHT (Dec. 7, 2021), <https://fivethirtyeight.com/features/how-biden-is-reshaping-the-courts/> [<https://perma.cc/CDP3-6UZL>].

<sup>47</sup> Tierney Sneed, *Democrats Embrace Hardball Judicial Nomination Tactics GOP Adopted Under Trump*, CNN (Jan. 13, 2022, 11:31 AM), <https://www.cnn.com/2022/01/13/politics/senate-judicial-nominations-blue-slips->

Senator Blackburn drew sharp criticism by saying that nominee Mathis had “a rap sheet with a laundry list of citations” stemming from failures to appear in court following minor traffic citations from over a decade ago.<sup>48</sup> NAACP President Derrick Johnson, among others in similar taste, called Senator Blackburn’s comments “[o]utrageous & offensive” in a tweet, noting that “[Mathis] got 3 speeding tickets a decade ago.”<sup>49</sup> During the Senate Judiciary Committee hearing, Senator Cory Booker, who is also Black, said he has a “rap sheet now probably much longer” than Mathis’s, in part because African-Americans are pulled over more often.<sup>50</sup> Although his confirmation was opposed by senators from his home state, Mathis became the first Black man and the second Black person to sit on the Sixth Circuit from Tennessee.<sup>51</sup>

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democrats/index.html [https://perma.cc/PGY8-AV7S]; Madison Alder, *Tennessee Senators Unhappy With Consultation on Judge Pick*, BLOOMBERG NEWS (Nov. 18, 2021, 5:49 PM), [https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X61T725G000000?bna\\_news\\_filter=us-law-week#jcite](https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X61T725G000000?bna_news_filter=us-law-week#jcite); see also Rose Wagner, *After the Blue Slip Burned With Trump in Office, Biden-Era Republicans Feel Its Absence*, COURTHOUSE NEWS SERV. (Jan. 12, 2022), <https://www.courthousenews.com/after-the-blue-slip-burned-with-trump-in-office-biden-era-Republicans-feel-its-absence/> [https://perma.cc/VQ6X-Q2ZR].

<sup>48</sup> Rachel Wegner, *Sen. Marsha Blackburn Criticized for Saying Judicial Nominee Has ‘Rap Sheet’ Over Court Appearances and Speeding Tickets*, TENNESSEAN (Jan. 14, 2022, 12:21 PM), <https://www.tennessean.com/story/news/politics/2022/01/13/marsha-blackburn-tennessee-senator-andre-mathis-lawyer-judicial-nominee-speeding-tickets-9198081002/>.

<sup>49</sup> @DerrickNAACP, TWITTER (Jan 12, 2022, 8:03 PM), <https://twitter.com/DerrickNAACP/status/1481431585358594057> [https://perma.cc/Q2UU-4KVK]. Senators Durbin and Booker, as well as Former NAACP President Cornell William Brooks, also criticized Senator Blackburn’s remarks. See Jennifer Bendery, *Marsha Blackburn Criticizes Black Judicial Nominee’s ‘Rap Sheet’ of Speeding Tickets*, HUFFPOST (Jan. 13, 2022, 3:41 PM), [https://www.huffpost.com/entry/marsha-blackburn-andre-mathis-black-judge-rap-sheet\\_n\\_61df1ec2e4b0603631b3d9a0](https://www.huffpost.com/entry/marsha-blackburn-andre-mathis-black-judge-rap-sheet_n_61df1ec2e4b0603631b3d9a0) [https://perma.cc/LM93-9BVZ]; Brad Dress, *CNN Legal Analyst Knocks GOP Senator Over Remark On Biden Nominee*, THE HILL (Jan. 13, 2022, 4:30 PM), <https://thehill.com/gop-lawmakers/589654-cnn-legal-analyst-knocks-gop-senator-over-remark-on-biden-nominee/> [https://perma.cc/WS9L-73VU] (Former NAACP President Cornell William Brooks stating in an interview with CNN, “‘Here we have the first woman elected to the United States Senate from the state of Tennessee humiliating, denigrating, demeaning a Black man who has the opportunity to be the first Black man to serve’ on that court”).

<sup>50</sup> @Judiciary Dems, TWITTER (Jan. 12, 2022, 2:56 PM), <https://twitter.com/JudiciaryDems/status/1481354360848269317> [https://perma.cc/9JWS-XB2U] (statement by Senator Cory Booker at 0:12–0:48).

<sup>51</sup> Micaela A Watts, *Andre Mathis Set to Become First Black Man From Tennessee on Sixth Circuit Court*, MEM. COM. APPEAL (Sept. 9, 2022, 4:59 PM), <https://www.commercialappeal.com/story/news/2022/09/09/andre-mathis-south-memphis-tennessee-appointed-circuit-court-appeals/8035408001/> [https://perma.cc/T3W2-Y4KJ].

After the White House consults senators and identifies candidates to fill a judicial vacancy, it works with several organizations to thoroughly vet the background of federal bench candidates. The White House Counsel's Office habitually reviews the federal bench candidates through conducting interviews—with the candidate's colleagues, any opposing counsel on past cases, supervisors, acquaintances, and members of the local legal community, including sitting judges—to discuss the candidate's background and qualifications.<sup>52</sup> Additionally, the Department of Justice's Office of Legal Policy (OLP) assists candidates in filling out the Senate Judiciary Questionnaire, which consists of twenty-six questions asking, among other things, about a candidate's personal and professional background and history, public and political affiliations, published writings and statements, and legal activities.<sup>53</sup> OLP takes about a month to assess the information provided by the candidate before preparing them for questioning before the Senate Judiciary Committee. Separately, but concurrently, the Federal Bureau of Investigation (FBI) takes four to six weeks to investigate a federal judicial candidates' criminal history, employment verification, tax compliance, and reputational interviews.<sup>54</sup> Last and certainly not least, the American Bar Association's Standing Committee on the Federal Judiciary investigates federal judicial candidates with one key difference from the other government sanctioned organizations: they now must wait until after the candidate becomes a nominee to begin investigating.<sup>55</sup>

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<sup>52</sup> See Madeleine Carlisle, *Inside Joe Biden's Plan to Confirm Diverse Federal Judges*, TIME (May 11, 2021, 5:49 PM), <https://time.com/6047501/joe-biden-federal-judges/> (describing how the Biden White House moves swiftly with regards to nominations); Nan Aron, Adjunct Professor of L., Geo. Univ. L. Ctr., *Judicial Selection Process and Reforming the Supreme Court Seminar Class Lecture* (Feb. 7, 2022) (on file with author) (describing the White House selection process).

<sup>53</sup> See, e.g., *Questionnaire for Judicial Nominees*, Brett Joseph Talley, S. COMM. ON THE JUDICIARY, <https://www.judiciary.senate.gov/imo/media/doc/Talley%20SJQ.pdf> [<https://perma.cc/KZ24-2WUL>].

<sup>54</sup> See MITCHEL A. SOLLENBERGER, *JUDICIAL APPOINTMENTS AND DEMOCRATIC CONTROLS* 80 (2011); Josh Lederman, *The Intrusive Investigation Behind Supreme Court Nominations*, PBS (Feb. 16, 2016, 4:32 PM), <https://www.pbs.org/newshour/nation/the-intrusive-investigation-behind-supreme-court-nominations> [<https://perma.cc/P4CL-AM7Q>].

<sup>55</sup> See Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?*, 10 WM. & MARY BILL OF RTS. J. 37, 41 (2001) (describing how the Bush Administration eliminated early ABA input for lower court nominees). The Standing Committee is most known for providing its "rating" to judicial candidates, evaluating them as "well-qualified," "qualified," or "not qualified." *Id.* at 41. Many have sternly called for reform to the nominations process to ensure the federal bench reflects the nation's racial diversity and professional breadth, including public defenders and civil rights lawyers. See, e.g., Clark Nelly, *Are a Disproportionate Number of Federal*

Finally, the Senate Judiciary Committee schedules and conducts a hearing—questioning the judicial nominee, submitting inquiries to understand judicial philosophy, and asking about the reasoning behind arguments made in cases or written decisions on commissions or in another court.<sup>56</sup> The process concludes with a final Senate floor vote, followed by the nominee’s appointment or rejection. If confirmed, the President signs the nominee’s commission to signal the conclusion of the process, and the federal bench appointee begins her lifetime appointment.

## 2. The Role Blue Slips Play in Federal Judicial Appointments

After the White House receives results from organizations vetting candidates and concludes its investigation, the President formally nominates a candidate, turning them into a nominee.<sup>57</sup> Once a nomination is declared, the process moves from the Executive Branch to Congress—specifically, the Senate Judiciary Committee, which is composed of twenty-two senators.<sup>58</sup> After receiving the name of the President’s nominee, the Senate Judiciary Committee sends a blue slip of paper to each home state senator. It appears as follows:

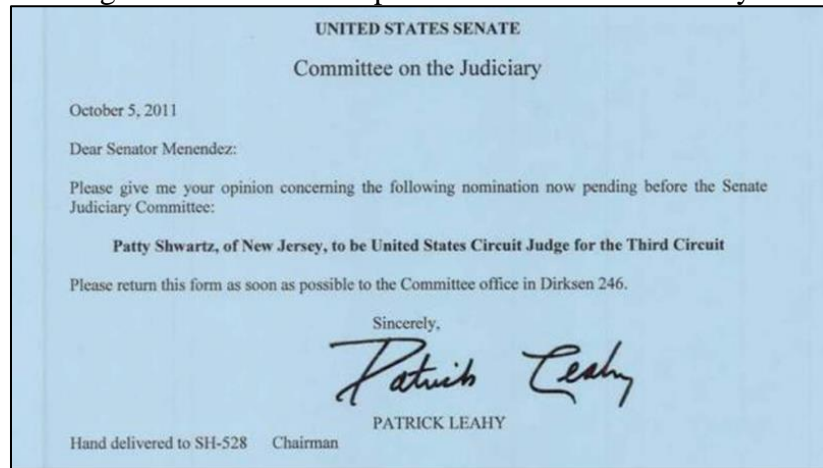
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*Judges Former Government Advocates?*, CATO INST. (May 27, 2021), <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates> [<https://perma.cc/WN9K-Z58P>].

<sup>56</sup> See *The Federal Judicial Nominations Process*, AM. CONST. SOC’Y, <https://www.acslaw.org/wp-content/uploads/2018/10/The-Federal-Judicial-Nominations-Process-1.pdf> [<https://perma.cc/E8W6-FZQ8>] (last visited Dec. 22, 2022) (describing the judicial nomination process).

<sup>57</sup> See *An Easy Guide to Federal Judicial Nominations*, CTR. FOR AM. PROGRESS, [https://www.americanprogress.org/wp-content/uploads/2012/11/JudicialNoms\\_print.pdf](https://www.americanprogress.org/wp-content/uploads/2012/11/JudicialNoms_print.pdf) [<https://perma.cc/DL8Z-LB28>] (last visited May 6, 2022).

<sup>58</sup> See *Committee Members*, S. COMM. ON THE JUDICIARY, <https://www.judiciary.senate.gov/about/members> [<https://perma.cc/N2VU-59NM>] (last visited Dec. 22, 2022).

Figure 1: 2011 Blue Slip from Senator Patrick Leahy<sup>59</sup>

Blue slips are plain light blue pieces of paper used to solicit views of home state senators about their approval or opposition of nominees the President submits.<sup>60</sup> The blue slip accomplishes the “advice” prong of the Senate’s duty as instructed by the Constitution.<sup>61</sup> When returning a blue slip, home state senators communicate to the Judiciary Committee that the President had received the advice of the home state senator before the nomination was made. However, it does not convey whether a home state senator will vote to confirm a given nominee.<sup>62</sup> Failure to return a blue slip indicates either a belief on the senator’s part that they have not been consulted or an objection to the nominee. As a matter of politics, home state senators have withheld blue slips to voice complaints of unfairness to produce news coverage for their constituents back home about new federal judges that may preside over state citizens’ cases in the future.<sup>63</sup>

<sup>59</sup> Kevin Drum, Commentary, *Blue Slips Are Finally Dead*, MOTHER JONES (Feb. 28, 2019), <https://www.motherjones.com/kevin-drum/2019/02/blue-slips-are-finally-dead/> [<https://perma.cc/X6TT-SRXF>].

<sup>60</sup> See S. COMM. ON THE JUDICIARY, *supra* note 8.

<sup>61</sup> See Josh Huder, *Senatorial Courtesy, Blue Slips Caught in the Fallout*, GOV’T AFFS. INST., <https://gai.georgetown.edu/senatorial-courtesy-blue-slips-caught-in-the-fallout/> [<https://perma.cc/2H6N-FGTJ>] (last visited Dec. 22, 2022).

<sup>62</sup> See S. COMM. ON THE JUDICIARY, *supra* note 8.

<sup>63</sup> Nan Aron, Adjunct Professor of L., Geo. Univ. L. Ctr., *Judicial Selection Process and Reforming the Supreme Court Seminar Class Lecture* (Mar. 21, 2022) (on file with author) (describing the White House selection process).

## II. HOW POLITICS UNRAVELED 100 YEARS OF TRADITION

This Part explores the practice of senatorial courtesy and blue slips. First, it provides a background of how senatorial courtesy was manifested tangibly into blue slips. Then, it examines the history and purpose behind the blue slip, noting that while there are times when blue slips are beneficial to pre-nomination consultation, blue slips are sometimes used as a tool to block a President's selection to ensure that otherwise exemplary candidates are not appointed to the bench. Finally, this Part discusses the modern-day impact the blue slip has made on the landscape of the federal judiciary.

### A. SENATORIAL COURTESY: RESPECT AND RESPONSIBILITY

Blue slips are “a manifestation of senatorial courtesy”<sup>64</sup> that have traditionally—in the name of collegiality—ensured the Senate's role in judicial appointments is respected.<sup>65</sup> Enforcement of the blue slip policy is conditioned on who chairs the Senate Judiciary Committee and the procedure installed during her tenure. Senatorial courtesy represents two sides of the same coin. On the positive side, it safeguards a senator's ability to directly influence who is selected as a nominee, but on the negative side, it protects the political patronage of individual senators.<sup>66</sup> The use of blue slips to protect senatorial patronage is problematic because it allows senators to submit only one name for each vacancy, meaning that senators usually submit the name of a candidate they wish to proceed with instead of a list of candidates suitable for the vacancy. Undeniably, this has led to lower quality appointments because it “unduly restrict[s] the pool of potential nominees.”<sup>67</sup> Although the motivations for senators withholding blue slips is not always overtly clear, senatorial patronage in today's polarizing ideological climate lends itself to the exclusive motives of political parties.

In the past, blue slips have restricted the pool of judicial nominees, which has resulted in a less diverse judiciary branch. Patronage can restrict the courts from becoming diverse because rather than submitting a list of five diverse candidates, as requested by President Jimmy Carter, senators often

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<sup>64</sup> MITCHEL A. SOLLENBERGER, CONG. RSCH. SERV., RL32013, THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY: 1917–PRESENT 2 (2003).

<sup>65</sup> See Carl Tobias, *Senate Blue Slips and Senate Regular Order*, 37 YALE L. & POL'Y REV. INTER ALIA 1, 2 (2018).

<sup>66</sup> O'BRIEN, *supra* note 34, at 70.

<sup>67</sup> *Id.* (quoting former Attorney General Elliot Richardson).



choose to put forth traditional recommendations.<sup>68</sup> Senators have used this strategy in hopes of securing a seat on the federal bench for their preferred candidate. Revisiting the example in Section I.B.1, Republican senators, like Marsha Blackburn, or even Democrats, may strategically elect to submit one candidate to ensure other qualified candidates, like Andre Mathis, who fit the President's preference, are not considered in the first place. Depending on how the blue slip policy is outlined and enforced by the Senate Judiciary Chair, a senator's preference, however motivated, could impede the appointment process if they are enabled to veto candidates with a negative or unreturned blue slip.

What is troubling about the use of blue slips is the lack of checks on their use in the judicial appointments process. Since at least 1917, blue slips have wielded the power of a mini filibuster without ever having been codified or included in the Senate Judiciary Committee's rules.<sup>69</sup> The Chair of the Committee can utilize her discretion to allow senators who have withheld blue slips to prevent a nominee from reaching a Senate Judiciary Vote or confirmation vote on the Senate floor.<sup>70</sup> Alternatively, a stringent blue slip policy can, and has, allowed senators to wield a robust power: to downright halt an appointment. On a macro level, halting appointments degrades America's federal judicial economy and increases pressure on active federal judges to bridge the gap by taking on a higher caseload. On a micro level, it provides a back door for senators to veto judges at odds with their political ideology, preventing the judiciary from tilting toward legal views they dislike.

#### B. THE LONG-STANDING HISTORY OF BLUE SLIPS: INSTITUTIONALIZED SENATORIAL COURTESY

Blue slips were first documented at the 65th Congress in 1917–18, though the National Archives suggests the blue slip procedure began sometime in the mid- to late-1910s.<sup>71</sup> The blue slip at its inception, and for forty years or so

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<sup>68</sup> See SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 238–39 (1977). Panels lacked diversity under President Carter: In 1977 there were zero women nominated and five panels failed to find racial minorities. See *id.*; Nan Aron, Adjunct Professor of L., Geo. Univ. L. Ctr., Judicial Selection Process and Reforming the Supreme Court Seminar Class Lecture (Jan 31, 2022) (on file with author) (describing the White House selection process).

<sup>69</sup> See A.B.A., *supra* note 5.

<sup>70</sup> See *id.*

<sup>71</sup> SOLLENBERGER, *supra* note 64, at 5; Alex Seitz-Wald, *The Dubious Century-Old U.S. Senate 'Blue Slip' Custom May Finally End*, NBC NEWS (Oct. 14, 2017, 7:05 AM), <https://www.nbcnews.com/politics/congress/dubious-century-old-u-s-senate-blue-slip-custom-may-n810571> [<https://perma.cc/RKZ4-FQEN>].

thereafter, operated as a request for the opinion of senators; a negative blue slip, at this time, did not automatically veto a nomination.<sup>72</sup> Political parties had little to no bearing on senators' opinions; nominees often made it to the Senate floor even with adverse objections. In 1956 and onward through 1978, Senator James O. Eastland set a rule that would weaponize blue slips for approximately twenty years.<sup>73</sup> Senator Eastland established a procedure requiring that a nominee "receive two positive blue slips from her home state senators before the nomination was to be considered by the committee."<sup>74</sup> Senator Eastland likely changed the policy to block rising civil rights nominees from reaching the bench.<sup>75</sup>

During the 96th Congress, Senator Edward M. Kennedy began a new reign as he chaired the Judiciary Committee, ushering in substantial changes to how judicial nominations were controlled.<sup>76</sup> Kennedy changed the policy to reflect that he would allow the full Committee to vote despite a home state senator failing to return a blue slip.<sup>77</sup> In 1979, at a Judiciary Committee hearing, Chair Kennedy said he had

instructed the committee staff to send to both Senators from a nominee's State a blue slip requesting the Senator's opinion and information concerning the nominee. If the blue slip is not returned within a reasonable time, rather than letting the nomination die I will place before the committee a motion to determine whether it wishes to proceed to a hearing on the nomination notwithstanding the absence of the blue slip. The committee, and ultimately the Senate, can work its will.<sup>78</sup>

Chair Kennedy's modification reduced the power Eastland established to automatically stop Committee action when home state senators objected. This

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<sup>72</sup> Mitchel A. Sollenberger, *The Blue Slip: A Theory of Unified and Divided Government, 1979–2009*, 37 CONG. & PRESIDENCY 125, 127 (2010).

<sup>73</sup> See BARRY J. McMILLION, CONG. RSCH. SERV., R44975, THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS 3 (2017).

<sup>74</sup> *Id.*; see also Memorandum from Senate Judiciary Committee Majority, to Members of the News Media, History and Context of the Blue Slip Courtesy (Nov. 2, 2017), <https://web.archive.org/web/20221216200528/https://www.toomey.senate.gov/imo/media/doc/Blue%20Slip.pdf> [<https://perma.cc/8HHU-Z4RC>].

<sup>75</sup> See Sollenberger, *supra* note 72, at 129–30 (describing how Senator Eastland used the blue slip to prevent additional victories for the Civil Rights movement).

<sup>76</sup> See GOLDMAN, *supra* note 68, at 263.

<sup>77</sup> See *id.*

<sup>78</sup> SOLLENBERGER, *supra* note 64, at 10–11.

change was reflected in the 96th Congress when President Jimmy Carter nominated James E. Sheffield to the District Court for Eastern Virginia.<sup>79</sup> President Carter's nomination was opposed by Senator Harry F. Byrd Jr., who sent a negative blue slip to Chair Kennedy; despite this objection, the Judiciary Committee held a hearing on August 26, 1980.<sup>80</sup> This action laid the foundation for future Judiciary Committee Chairs to ignore home state senators' requests, objections, and withholding of blue slips.

There are additional examples of Senator Kennedy's modification to the blue slip process, which led to inconsistencies in establishing clear boundaries within the blue slip policy, and the Judiciary Committee practicing the policy differently to approve appointments. By establishing the first post-Eastland changes to the blue slip policy, Chair Kennedy's de facto alteration empowered the Chair to use discretion in determining whether the Committee would act on a blue slipped nominee.<sup>81</sup> Well-intentioned on Kennedy's part, he claimed that his purpose for the modification was designed to allow "the Federal courts [to] . . . become more representative of the people of this Nation."<sup>82</sup> Kennedy recognized that partisan politics and senatorial courtesy muddled the intentions of the Framers to maintain judicial independence in the federal court system. Kennedy remarked,

we face the question of what to do about the longstanding practice of the one-member veto — or the blue-slip process . . . I will not unilaterally table a nomination . . . I cannot, however, discard cavalierly the tradition of senatorial courtesy, exception-riddled and outdated as it may be.<sup>83</sup>

In reality, while senators held on to the practice of blue slips, chairs had the discretion to advance or stop all candidates. Like most policies, rules always carried exceptions.

Even Senator Strom Thurmond violated his own blue slip policy by advancing a nominee who was found objectionable by a home state senator. When Senator Thurmond became the Committee's next Chair, he followed Kennedy's modification with a twist: he claimed "that if either Senator

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<sup>79</sup> *Id.* at 11; see *James Sheffield Obituary*, WASH. POST (Apr. 2, 2013), <https://www.legacy.com/us/obituaries/washingtonpost/name/james-sheffield-obituary?id=6006641> [<https://perma.cc/3SH6-UZJF>].

<sup>80</sup> Donald P. Baker & Karlyn Barker, *Nomination of Richmond Black as Federal Judge Is in Jeopardy*, WASH. POST (Sept. 9, 1980), <https://www.washingtonpost.com/archive/politics/1980/09/09/nomination-of-richmond-black-as-federal-judge-is-in-jeopardy/e89c0843-7739-445f-a44e-6bc2be0bbbde/>.

<sup>81</sup> SOLLENBERGER, *supra* note 64, at 11.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 11–12 (alterations in original).

objects to a nomination we should not go forward with it.”<sup>84</sup> However, in 1983, Chair Thurmond ignored Senator Cranston’s objection for President Regan’s nominee John P. Vukasin Jr. to be appointed to the District of Northern California.<sup>85</sup> “This vote marked the first time since 1951 that the Judiciary Committee voted to report out a nomination despite the blue slip objection of a home-state Senator.”<sup>86</sup> Chair Kennedy’s alteration of the blue slip policy was substantially expanded by Chair Thurmond, who used his discretion to vote for nominees to go to the Senate floor. However, because the blue slip is not a Committee rule but rather a matter of tradition, and because the Chair has the discretion to change it, partisan politics caused chairs to apply blue slip policies inconsistently.

When Joseph R. Biden became Chair in 1987, he continued the practice and use of the blue slip policy. Chair Biden was the first to issue a policy letter by a Judiciary Committee regarding the use of the blue slip to process federal circuit and district court nominations.<sup>87</sup> Biden’s policy letter stated,

The return of a negative blue slip will be a significant factor to be weighed by the committee in its evaluation of a judicial nominee, but it will not preclude consideration of that nominee unless the Administration has not consulted with both home state Senators prior to submitting the nomination to the Senate.<sup>88</sup>

Biden’s policy further expanded the Chair’s discretion. Chair discretion translated into the White House pushing forward nominees without proof of having consulted non-party senators. The next Chair, Senator Orrin Hatch, created a more detailed policy in response to the frustrations of senators not receiving “the level of consultation that they ha[d] expected.”<sup>89</sup> Chair Hatch noted:

[O]ne way to avoid such confrontations [between the Senate and the White House] in the future is for the President to engage in meaningful consultation with the Senate before making significant nominations .... Countless historical examples justify consultations; the public supports it; and common sense counsels it ... In an era of divided government, the choice the two branches

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<sup>84</sup> *Id.* at 12.

<sup>85</sup> *See id.*

<sup>86</sup> *Id.* at 12–13.

<sup>87</sup> *See id.* at 14.

<sup>88</sup> Sollenberger, *supra* note 72, at 135.

<sup>89</sup> SOLLENBERGER, *supra* note 64, at 15.

face with respect to nominations is the choice we face with respect to all other matters: cooperation or confrontation .... We are confident that meaningful consultation can occur without reducing the role prerogatives of either branch of government, and in a way which more fully informs the President of other points of view prior to rather than after a nomination is made.<sup>90</sup>

Still, like Biden and Thurmond, Hatch used his discretion to push through nominees.<sup>91</sup> These acts of discretion only became more contentious throughout time, causing the new unspoken standard to exist: the Chair reserves the right to pick which nominees are voted on to go to the Senate floor despite consultation by the President—a benefit that the party in control of both the Senate and the Presidency would come to wield.

#### C. POLITICS AND PARTISANSHIP: LANDSCAPING THE JUDICIARY ONE VETO AT A TIME

During the Obama Administration, both Senators Patrick Leahy and Chuck Grassley required that nominees receive two positive blue slips from home state senators.<sup>92</sup> As a result of this blue slip policy, Democrats under President Obama were unsuccessful at achieving federal judicial confirmations, securing only four percent of the total circuit judges and seven percent of total district judges, both approximately a quarter of the number of confirmations former administrations averaged in the final two years of the administration.<sup>93</sup> President Obama nominated forty-nine candidates for the federal bench at the end of his term, yet only nine were confirmed.<sup>94</sup> Eighteen nominees were blocked solely based on failed returned blue slips from home

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<sup>90</sup> *Id.* (alterations in original).

<sup>91</sup> Steve Benen, *White House Feeling Blue Over Blue Slips*, MSNBC (Mar. 24, 2014, 12:41 PM), <https://www.msnbc.com/rachel-maddow-show/white-house-feeling-blue-over-blue-slips-msna292651> [<https://perma.cc/KDK2-E5FX>] (“Even if both senators objected to a nomination, it would still go to the floor for a vote.”).

<sup>92</sup> *But see* Statement, Chuck Grassley, Chairman, Senate Judiciary Committee, Grassley Statement for the Committee Record: I’m Maintaining the Blue Slip Courtesy (Nov. 30, 2017), <https://www.judiciary.senate.gov/grassley-statement-for-the-committee-record-im-maintaining-the-blue-slip-courtesy> [<https://perma.cc/U2ZY-UDJB>] (Senator Grassley insisting his “decision not to hold hearings for . . . nominees wasn’t based solely on the lack of blue slips” and that “[n]othing . . . suggests I planned to strictly require two positive blue slips . . . for circuit court nominees”).

<sup>93</sup> *See* Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump—What Has He Done With Them?*, BROOKINGS (June 4, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump/> [<https://perma.cc/W2HD-HSQ6>].

<sup>94</sup> *Id.* (“None of the seven circuit nominees that Obama submitted in 2015 or 2016 were confirmed.”).

state senators.<sup>95</sup> Republican senators did not withhold their blue slips because they did not agree with President Obama's nominees. Instead, they withheld blue slips because they knew Democrats would not proceed per the policy at the time. The likely reason Republicans did not turn in blue slips is because they wanted to hold open a vacancy, hoping a Republican President would win the 2016 national election and they would therefore have more seats to fill.

Conversely, in 2017, Judiciary Chair Chuck Grassley changed the blue slip policy, emphasizing that he would not consider blue slips for federal circuit court nominees.<sup>96</sup> Senator Grassley argued the mechanism should not be used as "single-senator vetoes."<sup>97</sup> Senate Republicans ignored the blue slip tradition for court of appeals nominees under President Trump eighteen times, which resulted in seventeen of those nominees breezing through the Committee to confirmation over clear and contentious Democratic objections.<sup>98</sup> However, Republicans kept blue slips for district court nominees.<sup>99</sup> If a Democratic senator did not turn in a blue slip, that candidate did not move. The arbitrary nature of discretion leveraged by the blue slip policy has reshaped the federal judiciary. Republicans weaponizing blue slips under President Obama led to President Trump inheriting more than 100 judicial vacancies.<sup>100</sup> Before leaving the White House, President Trump appointed more than 200 judges to the federal bench.<sup>101</sup> As a result,

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<sup>95</sup> See Dianne Feinstein, Opinion, *Opinion: Republicans Reversed Course on 'Blue Slips' for Judicial Nominees*, ROLL CALL (Nov. 13, 2017, 5:02 AM), <https://rollcall.com/2017/11/13/opinion-republicans-reversed-course-on-blue-slips-for-judicial-nominees/> [https://perma.cc/A329-F9HG].

<sup>96</sup> See Madison Alder, *Fate of Senate Custom an Early Test for Durbin on Judicial Picks*, BLOOMBERG LAW (Feb. 4, 2021, 4:46 AM), <https://news.bloomberglaw.com/us-law-week/fate-of-senate-custom-an-early-test-for-durbin-on-judicial-picks>.

<sup>97</sup> *Id.*

<sup>98</sup> Jennifer Bendery, *Dick Durbin to GOP: Our Turn to Confirm Judicial Nominees Without Your Consent*, HUFFPOST (Jan. 13, 2022, 6:21 PM), [https://www.huffpost.com/entry/dick-durbin-biden-judicial-nominees-blue-slips\\_n\\_61df1cc6e4b0a2670288219f](https://www.huffpost.com/entry/dick-durbin-biden-judicial-nominees-blue-slips_n_61df1cc6e4b0a2670288219f) [https://perma.cc/UM4B-KLZQ].

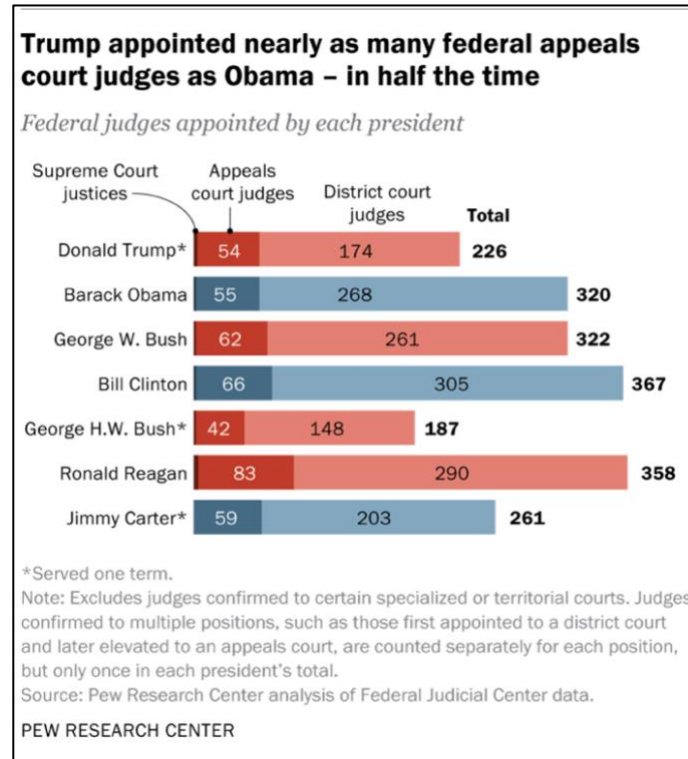
<sup>99</sup> *See id.*

<sup>100</sup> Philip Rucker & Robert Barnes, *Trump to Inherit More Than 100 Court Vacancies, Plans to Reshape Judiciary*, WASH. POST (Dec. 25, 2016), [https://www.washingtonpost.com/politics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d\\_story.html](https://www.washingtonpost.com/politics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d_story.html).

<sup>101</sup> John Gramlich, *How Trump Compares With Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [https://perma.cc/T4YA-SHGA].

Republicans have reshaped—and perhaps imbalanced—the federal judiciary’s architecture with conservative judges.

Figure 2: President Trump Out-Paces Three Administrations in Four Years<sup>102</sup>



For instance, “[President] Trump appointed 54 federal appellate judges in four years, one short of the 55 Obama appointed in twice as much time.”<sup>103</sup> But now that Democrats control the Senate and the White House, it remains to be seen whether they will continue to respect the blue slip policy for district court nominations, in light of Republicans’ refusal to return them. And if it comes down to it, Democrats should do away with the blue slip policy if Republicans ignore home state senator objections and withhold blue slips. This course of action would aggressively rebalance the federal judiciary’s landscape. In 2022, Senate Judiciary Committee Chair Dick Durbin remarked, “Republicans chose to abandon this senatorial courtesy . . . . Simply put, there shouldn’t be one set of rules for Republican nominees under

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

a Republican president and a different set for nominees under a different president.”<sup>104</sup>

### III. REBALANCING THE FEDERAL JUDICIARY

Notwithstanding the current blue slip policy, important questions persist: *what is the future of consulting home state senators and using the blue slip, and how will this impact the landscape of the federal judiciary?* This Part explores the modern-day impact the Biden Administration can make on the federal judiciary by continuing to reduce the power of the blue slip policy established during the Trump Administration. This Part also recommends eliminating the blue slip policy and argues for alternatives that minority political parties can pursue to influence the President’s selection of judges.

#### A. PRESIDENT BIDEN’S QUEST TO DIVERSIFY THE FEDERAL JUDICIARY

The current Chair of the Senate Judiciary Committee, Dick Durbin, has maintained the same blue slip practice during the Biden administration, appointing judges “at a record-breaking pace.”<sup>105</sup> Continuing the Republican policy formed in the Trump years, and surpassing all his predecessors since President Kennedy, Chairman Durbin helped confirm eighty-eight Biden-appointed federal judges during the President’s first two years—forty-two of which were appointed in the first year.<sup>106</sup> Biden’s 2021 appointees constituted seven percent of the 175 circuit judges and five percent of the 611 district judges in active status, current as of January 20, 2022.<sup>107</sup> As of December 2022, the Senate has confirmed ninety-seven—and counting—of President Biden’s judicial nominees, the most in decades in the first two years of a President’s term.<sup>108</sup> President Jimmy Carter holds the four-year record for

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<sup>104</sup> Bendery, *supra* note 98.

<sup>105</sup> Simon, *supra* note 24.

<sup>106</sup> Russell Wheeler, *Biden’s First-Year Judicial Appointments—Impact*, BROOKINGS (Jan. 27, 2022), <https://www.brookings.edu/blog/fixgov/2022/01/27/bidens-first-year-judicial-appointments-impact/> (describing how President Biden appointed forty-two lower-court appointments within his first year); Mogulescu, *supra* note 26 (“In Biden’s first two years, he has confirmed one Supreme Court justice (Ketanji Brown Jackson), 26 circuit court judges, and 61 district court judges . . .”).

<sup>107</sup> See Wheeler, *supra* note 106.

<sup>108</sup> Nate Raymond, *U.S. Senate Confirms First Black Woman to Conservative-Leaning 5th Circuit*, REUTERS (Dec. 13, 2022 2:24 PM), <https://www.reuters.com/legal/government/us-senate-confirms-first-black-woman-conservative-leaning-5th-circuit-2022-12-13/>.



most appointments, totaling 261—59 to the court of appeals—followed by President Trump, totaling 234—54 to the court of appeals.<sup>109</sup>

White House Chief of Staff Ron Klain asserted, “[O]ne thing we’ve done that hasn’t gotten a lot of attention is confirmed more federal judges than any president in four decades.”<sup>110</sup> A more sobering reality reflects that even with Biden’s historical progress, the White House will probably not be able to fundamentally rebalance the rightward turn of the judiciary caused by President Donald Trump and Senator Mitch McConnell. President Trump’s judicial appointees comprise more than a quarter of the federal bench, cementing conservative majorities and reducing influence in “courts with a liberal valence.”<sup>111</sup> President Biden’s confirmations have mostly replaced Democratic party-appointed judges in historically liberal courts—which does not alter the slanted landscape of the conservative—leaning judiciary. President Trump changed the court of appeals’ proportional political composition from forty percent occupation by Republican appointees to fifty-four percent.<sup>112</sup> But blue slips no longer apply to court of appeals nominees, so this alteration will be felt in the federal judiciary for years to come.

Although President Trump increased the percentage of Republican appointed court of appeals judges from forty percent to fifty-four percent, he did not change the balance of the district courts.<sup>113</sup> President Biden came into office with a Democratic-appointed majority of active status judges on district courts, and as of October 2022, after post-inauguration retirements, Democrats maintained a slight edge.<sup>114</sup> This leaves room for Democrats to slant the judiciary in anticipation of continued non-use of the historical blue slip policy by Republicans because they have regained control of the Senate—no party held a majority formerly;<sup>115</sup> Vice President Kamala Harris

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<sup>109</sup> Russell Wheeler, *Can Biden ‘Rebalance’ the Judiciary?*, BROOKINGS (Mar. 18, 2021), <https://www.brookings.edu/blog/fixgov/2021/03/18/can-biden-rebalance-the-judiciary/> [https://perma.cc/HF5K-293Q].

<sup>110</sup> *Morning Joe* (MSNBC television broadcast Jan. 20, 2022), [https://archive.org/details/MSNBCW\\_20220120\\_110000\\_Morning\\_Joe](https://archive.org/details/MSNBCW_20220120_110000_Morning_Joe) [https://perma.cc/4E9A-ATQX] (last visited Mar. 9, 2023).

<sup>111</sup> See Nick Niedzwiadek, Tina Sfondeles, Alex Thompson & Max Tani, *Biden Veers Into Trump’s Judicial Wall*, POLITICO (Jan. 20, 2022, 6:28 PM), <https://www.politico.com/newsletters/west-wing-playbook/2022/01/20/biden-veers-into-trumps-judicial-wall-495797> [https://perma.cc/5ZUD-RELP].

<sup>112</sup> Wheeler, *supra* note 109.

<sup>113</sup> *Id.*

<sup>114</sup> *See id.*

<sup>115</sup> On Friday, December 9, 2022, Senator Krysten Sinema announced “she would leave the Democratic Party and become an independent.” Carl Hulse, *Krysten Sinema Says She Will Leave the Democratic Party*, N.Y. TIMES (Dec. 9, 2022), <https://www.nytimes.com/2022/12/09/us/politics/krysten-sinema-democrats.html?>

acted as the President of the Senate and the tiebreaker for floor votes.<sup>116</sup> Accordingly, blue slips should be eliminated. Blue slips as a policy are ineffective in helping the President consult home state senators because partisan politics has impeded authentic consideration of any opposing party President's judicial nominees. As such, home state senators' objections through blue slips should be considered but should not bar a nominee going forward to Committee for a vote because: (1) nominations are processed faster by the Judiciary Committee, and a greater number of the President's judicial nominees would be confirmed, thereby rebalancing the judiciary; (2) there will be increased party-line votes; and (3) better quality judges can be appointed.

Honoring the arcane Senate tradition in acknowledging objections through blue slips has slowed down nominations, resulting in fewer judges appointed. President Biden has committed to appointing diverse and progressive candidates to the bench. Discarding the blue slip procedure is necessary to move our legal system towards the promise of equal justice under the law. Blue slips have exacerbated the anti-democratic nature of the Senate by giving home state senators undue control over the President's judicial appointments, which impacts daily lives of citizens in America. In bypassing blue slips, President Biden can effectively leverage Chair Durbin's discretion to ignore the blue slip policy established under President Trump to appoint judges in record pacing placements—which is the current strategy. Segregationists, similarly, used blue slips to sustain discrimination and racism throughout America “as a tool of massive resistance to the Supreme Court's decision in *Brown v. Board of Education*.”<sup>117</sup> But now, Biden can use

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campaign\_id=190&emc=edit\_ufn\_20221209&instance\_id=79716&nl=from-the-times&regi\_id=200822222&segment\_id=115466&te=1&user\_id=f658d4c1a990ef84154952e2db33e2fd. Senator Sinema, as of December 9, 2022, has supported all of President Biden's lower court judicial nominees and has claimed that she intends to caucus with Democrats, allowing for the advancement of President Biden's judicial nominees. *See id.*; Yvette Borja, *Biden Is Transforming the Federal Judiciary, But the Hardest Work Is Still Ahead*, BALLS & STRIKES (Dec. 22, 2022), <https://ballsandstrikes.org/nominations/biden-judges-two-years-in/> [<https://perma.cc/PQ4K-WWMH>].

<sup>116</sup> *See About the Vice President (President of the Senate)*, U.S. SENATE, <https://www.senate.gov/about/officers-staff/vice-president.htm#:~:text=The%20Constitution%20names%20the%20vice,ballots%20cast%20in%20Presidential%20elections> [<https://perma.cc/LC97-FCKF>] (last visited Mar. 9, 2023).

<sup>117</sup> *To Urge an End to the Filibuster and “Blue Slip” Practice*, NAACP (2021), <https://naacp.org/resources/urge-end-filibuster-and-blue-slip-practice> [<https://perma.cc/Y4B4-6GJW>]; *see* Tuan Samahon, *Federal Judicial Selection and the Senate's Blue Slip “Tradition,”* NEV. LAWYER 12 (Oct. 2012), <https://www.nvbar.org/wp->

the dormant nature of blue slips to make progress on contemporary racial justice issues. By not having to consult home state senators, Biden's White House Counsel and supporting investigating offices can vet potential nominees faster and subsequently appoint more judges without having to experience delays in the Committee.

Conversely, once Republicans reassume control, the same tactic could probably be used. However, the net benefit is that those federal judges are appointed for a lifetime, leaving the legacy of progressive judges in place for the foreseeable future; this helps create diverse results for everyday Americans. It is for this reason that Democrats' approach to judicial nominees under Biden signifies a tremendous lesson for the filibuster battle. It underscores the likelihood that any rules change in the chamber will eventually be used by the party in power, regardless of its stance when out of power. For example, Republicans highlighted former Senate Majority Leader Harry Reid's 2013 elimination of filibusters for the Executive Branch and lower court judicial nominees,<sup>118</sup> but Republicans axed the sixty-vote margin for Supreme Court justices in 2017.<sup>119</sup> In the same way, Democrats are using blue slips under Biden, maintaining the policy established under Trump.

Eliminating the blue slip procedure will help fill judicial vacancies, leaving less to be inherited by the next presidential administration. If Democrats desire a more balanced federal bench that better reflects the demographics and diversity of people in America, they must ensure as many replacements as possible for unfilled judicial seats—mixed with vacancies preferably by both political parties. Accordingly, should Democrats abolish blue slips altogether for circuit and district courts, President Biden will signal to judges eligible for retirement in states represented by Republican senators that qualified, diverse nominees will replace them if they choose to retire. Because Republicans lost the 2022 midterm elections in the Senate, those

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content/uploads/NevLawyer\_Oct\_2012\_BlueSlips-1.pdf [https://perma.cc/6WCL-W8WA] (“When segregationist ‘Dixiecrat’ Senator John Eastland chaired the Judiciary Committee, he endowed the blue slip with veto power to, among other things, keep Mississippi’s federal judicial bench free of sympathizers with *Brown v. Board of Education*.”); Ian Millhiser, *The Imaginary Rule That Keeps Obama’s Judges From Being Confirmed*, THINKPROGRESS (Apr. 17, 2014, 5:00 PM), <https://archive.thinkprogress.org/the-imaginary-rule-that-keeps-obamas-judges-from-being-confirmed-2926a0c0452f/> [https://perma.cc/Y8F8-YCSA] (because the Supreme Court “largely delegated the task of implementing *Brown* to local federal trial judges . . . it mattered a great deal who sat on federal district courts in the segregated South”).

<sup>118</sup> See Burgess Everett & Seung Min Kim, *Senate Goes for ‘Nuclear Option,’* POLITICO (Nov. 22, 2013, 5:09 PM), <https://www.politico.com/story/2013/11/harry-reid-nuclear-option-100199> [https://perma.cc/SH86-UY87].

<sup>119</sup> Russell Berman, *Republicans Abandon the Filibuster to Save Neil Gorsuch*, ATLANTIC (Apr. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/04/republicans-nuke-the-filibuster-to-save-neil-gorsuch/522156/>.

judicial vacancies are less likely to be filled with staunch right-wing conservatives, which should prevent U.S. courts at lower levels from continuing to develop a supermajority of conservative ideology across the federal judiciary in the near future. For now, recent and upcoming lifetime appointments will mean that the generations to come will continue to be represented by courts that often do not represent the diversity of everyday Americans.

#### B. ALTERNATIVES TO THE BLUE SLIP

A lingering question is: *how then will the “advice” prong of the Constitution be satisfied if blue slips are eliminated?* Regardless of whether home state senators agree with a presidential nominee, they can still provide advice, guidance, or recommendations. Partisan politics suggests that opposing party practices will deem many presidential nominees ineligible for consideration. But the President is not required to accept this advice. Instead, the Judiciary Committee should note a senator’s objection—either before or after the nomination for opposing political parties—and proceed to let the Senate chamber vote, fulfilling the “consent” prong cited in the Appointments Clause. Proceeding in this manner will translate into both parties possessing equal footing with judicial appointments in the future. The political environment has become too controversial for blue slips to operate effectively for the appointment of lower court judges. What was a consequence for President Obama can now be used to benefit President Biden—just as it was beneficial for President Trump.

Hypothetically speaking, Congress could pass a statute requiring that the President be limited in filling only forty percent of the Judiciary over combined presidential terms. If half the federal bench decides to leave, which probably would not happen, the statute could eliminate the possibility of one party filling all vacant seats (unless we have one party win four presidential elections). The other option is to mandate that partisan identifiers—that is the ideals of the judge and the political party that favors those preferences—are factored into consideration. The Federal Judicial Center, which “conducts policy research and provides continuing education resources for the judicial branch,”<sup>120</sup> could work with senators—functioning as a non-partisan selection commission—to choose candidates alongside senators for consideration. This could force consenting presidents to appoint from both

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<sup>120</sup> *Federal Judicial Center*, GOVERNMENT AGENCIES AND ELECTED OFFICIALS, <https://www.usa.gov/agencies> [<https://perma.cc/BT98-4VHP>].

parties at a moderate rate, but it may also contribute to more fairness in selecting judges. If patronage continues to be a tool used to appoint judges, perhaps a new statute limiting bench placement could open bipartisan efforts to work together in the future.

One counterargument or consideration for reverting to the age-old blue slip custom is that the Senate's frustration over a lack of consultation from the President could activate district and appellate court expansion,<sup>121</sup> which is not exactly a bad thing. The United States is the world's "most litigious society . . . spend[ing] roughly \$310 billion a year" on litigation.<sup>122</sup> We need more judges to render more decisions across the states. So, while doing away with blue slips might trigger Congress to expand lower federal courts, citizens benefit from having their cases heard and remedied in less time. One drawback of lower court expansion and eliminating blue slips is that depending on when it occurs, the landscape of the federal judiciary could tilt overwhelmingly to one political ideology. The fear there would be that courts do not accurately reflect what citizens in America want or believe will help produce solutions to their cases and controversies.

Finally, eliminating blue slips may help increase the standards for which judges are evaluated to obtain a position on the federal bench if Democratic constituents can be influenced to vote based on who senators recommend. Democrats hardly care about the placement of judges in their consideration to vote in congressional and even national elections.<sup>123</sup> This is likely due to a lack of voter consciousness about the federal judiciary: few voters possess the aptitude to "evaluate judicial performance based on their limited knowledge about judges or judging."<sup>124</sup> Republicans, on the other hand, emphasize judicial appointments as line items promised in their campaigns.

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<sup>121</sup> Article III, Section I of the Constitution grants congressional power to establish lower courts. *See* U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour . . ."); Mark Joseph Stern, *Congress Might Actually Expand the Courts*, SLATE (Feb. 24, 2021, 5:43 PM), <https://slate.com/news-and-politics/2021/02/congress-expand-courts.html> [<https://perma.cc/7N4D-752W>] ("For most of American history, Democrats and Republicans routinely worked together to expand the size of federal courts.").

<sup>122</sup> Paul H. Rubin, *More Money into Bad Suits*, N.Y. TIMES (Nov. 16, 2010, 4:44 PM), <https://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/more-money-into-bad-suits>.

<sup>123</sup> *See* Emma Green, *How Democrats Lost the Courts*, ATLANTIC (July 8, 2021), <https://www.theatlantic.com/politics/archive/2021/07/liberal-judges-supreme-court-breyer/619333/> ("Democratic voters don't care as much about courts as Republicans do . . .").

<sup>124</sup> *See* Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553, 555 (2013).

All things being equal, promoting meaningful consultation between the two parties is beneficial to the process. However, given the abuse of the blue slip, particularly in recent years by Republicans, it remains to be seen whether the current practice is useful or presents an undue frustration to the President. The blue slip policy will be tested and tested soon: this is because many of the vacancies in district courts are in states with two Republican senators. It remains to be seen whether Republican senators will turn in their blue slips, turn them in with an objection, or withhold them altogether. If Republicans begin to use the blue slips to delay or cancel the policy altogether—nixing the nomination of qualified candidates—this Note recommends that Chair Dick Durbin eliminate the process.

#### CONCLUSION

At a time when politics has divided the nation more than we have been since the Civil War, Congress and the White House must ensure the People have a federal judiciary that is independent and open-minded. This Note demonstrates how political parties, and more recently Republicans, have used blue slips to place politics above quality judicial appointments. Blue slips have no legal authority, which allows the Chair of the Judiciary Committee to use his discretion about handling judicial nominations offered by the President. Having one party follow the custom and another abuse it without proper or just reprimand has rendered the custom nearly irrelevant. Blue slips diminish trust and respect for the judiciary because they weaken the fabric of our democracy by obstructing judicial appointments. Blue slip elimination will make the playing field equal for both parties to continue appointing federal judges overtly, with partisan preference.