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## The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process

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# THE “BLUE SLIP”: ENFORCING THE NORMS OF THE JUDICIAL CONFIRMATION PROCESS

Brannon P. Denning\*

## INTRODUCTION

If there is any bright side to the unbelievably rancorous confirmation battles that marked the Clinton years — which are also inevitable in the Bush Administration — it is that they have exposed to public scrutiny customs and practices that enable individual senators to wield a *de facto* veto over presidential nominees (and the defensive measures available to presidents).<sup>1</sup> After 1994, for example, when Republicans regained control of the House and the Senate, senators used the power of the committee chairman and the “hold” to kill nominations for cabinet positions, department heads, ambassadorships, and judgeships on what seemed to be an unprecedented scale.<sup>2</sup> For this, Republicans faced intense criticism.

Now, recent controversies over President Bush’s judicial appointments have brought to light another obscure Senate custom, the blue slip. This essay sheds light on the blue slip, its relation to the protean concept of senatorial courtesy, and examines its function in the Senate’s “advice and consent” role.

In Part I, I reconstruct the operation and origins of the blue slip process; Part II discusses the recent flap over the blue slip occasioned by the announcement of Bush’s first judicial nominees, whose selection was nearly overshadowed by the Republicans’ loss of the Senate. I contrast the process’s operation in the new Senate confirmation environment with earlier descriptions of it. Part III considers whether the process is consistent with the Constitution’s allocation of power to appoint and confirm nominees to federal posts. While conceding that the blue slip finds no explicit sanction in the Constitution, I argue in Part IV that it functions as a mechanism to sanction a failure by the president to seek senators’ *advice* on judicial nominees, not just their *consent*. Part V then examines the possibility for reforming this much-criticized process.

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<sup>1</sup> See Brannon P. Denning, *Reforming the New Confirmation Process: Replacing “Despise and Resent” with “Advice and Consent,”* 53 ADMIN. L. REV. 1 (2001) [hereinafter Denning, *Reforming the New Confirmation Process*]; Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of “Acting” Executive Branch Officials,* 76 WASH. U. L.Q. 1039 (1998) [hereinafter Denning, *Vacancies Act*].

<sup>2</sup> See Denning, *Reforming the New Confirmation Process*, *supra* note 1, at 20-23 (describing the use of the hold in recent confirmation controversies).

## I. A SHORT HISTORY OF THE BLUE SLIP

The blue slip is the result of the Senate Judiciary Committee's institutionalization of "senatorial courtesy."<sup>3</sup> When a judicial nomination<sup>4</sup> is made, the chair of the Judiciary Committee sends "blue slips" (so called because of the color of paper used) to the senators of the nominee's home state. If even one senator declines to return the slip, then the nomination is dead in the water, or further action will be extremely difficult, depending on which practice the committee chair decides to follow.<sup>5</sup>

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<sup>3</sup> "Senatorial courtesy" itself is a term that requires some unpacking:

Traditionally, the term *senatorial courtesy* has referred to the deference the president owes to the recommendations of senators from his own political party on the particular people whom he should nominate to federal offices in the senators' respective states. A second form of senatorial courtesy is the deference a member of Congress, particularly a senator, expects to get from his or her Senate colleagues (or, in the case of a representative, from his Senate counterparts) with respect to his or her own nomination to a confirmable post. Yet another form of senatorial courtesy is the expectation that senators (usually from the president's political party) will confer or consult with the president prior to his nominating people to fill confirmable posts in their fields of expertise . . . or people from their respective states to fill national offices.

MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 143-44 (2000); *see also* HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* 7-13 (1972); Joseph P. Harris, *The Courtesy of the Senate*, 67 *POL. SCI. Q.* 36 (1952). A historical survey of the practice of the first of Professor Gerhardt's three types of senatorial courtesy can be found in Dorothy Ganfield Fowler, *Congressional Dictation of Local Appointments*, 7 *J. POL. SCI.* 25 (1945). *See also infra* notes 109-21.

<sup>4</sup> The blue slip is *only* used by the Judiciary Committee, and thus only affects a president's judicial nominees. This distinguishes it from the "hold," also an apparent institutionalization of senatorial courtesy, which allows a senator to delay a vote on a matter for as long as his or her colleagues deign to honor it. Originally used to ensure that a senator might delay a vote on a matter if he or she was unable to participate, the hold has been used with vigor over the last several years to delay nominations. For more on the hold and its use by senators, *see* Denning, *Reforming the New Confirmation Process*, *supra* note 1, at 20-22; *see also* WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* (5th ed. 2001). Note that chairmen may also effectively prevent consideration of nominees simply by not holding hearings or voting the nomination out of the committee.

<sup>5</sup> It is not clear which has been the historical rule, and which was the rule when the Republicans were in power. In the 1980s, Senator Kennedy announced that the blue slip would no longer be an automatic veto; Senator Hatch claims to have followed that practice, but others dispute his characterization. On the history of the blue slip, *see infra* notes 9-58.

The blue slip's origins are somewhat obscure, and there is a relative dearth of information on it. The last extensive debate that occurred on its use was in the late 1970s, when Senator Ted Kennedy was chairman of the Judiciary Committee, and announced that the withholding of blue slips would no longer automatically be fatal to a nominee's chances.<sup>6</sup> Such a public debate was occasioned by the sudden creation of over 100 district and circuit court vacancies under the Omnibus Judgeship Act,<sup>7</sup> and by President Carter's decision to rely on nominating commissions to select candidates by merit.<sup>8</sup>

According to a memorandum prepared by the Judiciary Committee staff in 1979, the blue slip procedure had been around for over 25 years.<sup>9</sup> It represented an effort by the Committee to institutionalize the "senatorial courtesy" owed to fellow senators' objections to nominees from their home state.<sup>10</sup> A couple of interesting facts emerge in the Committee staff's description of the blue slip procedure. First, on the blue slip itself is written the following: "Under a rule of the Committee, unless a reply is received from you within a week from this date, it will be assumed that you have no objection to this nomination."<sup>11</sup> But the Staff Memorandum reported that, as of 1979, "at least for a decade there has been no 'rule of the Committee' on the subject" — meaning that there is no formal basis in the Committee's rules for the procedure.<sup>12</sup> This is still true today.<sup>13</sup> Second, read literally, failure to return the blue slip means *no* objection, which is precisely the opposite of how the procedure works. As the Staff Memorandum noted, "[n]o

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<sup>6</sup> See *Selection and Confirmation of Federal Judges: Hearing Before the Senate Committee on the Judiciary, Part I, 96th Cong. (1979)* [hereinafter *Senate Hearing*]; Elliott E. Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate's Role?* (pt. 1), 64 JUDICATURE 60, 69-73 (1980); see also W. Gary Fowler, *A Comparison of Initial Recommendation Procedures: Judicial Selection Under Reagan and Carter*, 1 YALE L. & POL'Y REV. 299, 328-30 (1983).

<sup>7</sup> Pub. L. No. 95-486, 92 Stat. 1629 (1978).

<sup>8</sup> See SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997).

<sup>9</sup> See Memorandum from Senate Judiciary Committee Staff to Senator Edward M. Kennedy, Chair, Senate Judiciary Committee (Jan. 22, 1979), reprinted in *Senate Hearing, supra* note 6, at 118, 119 ("The blue slip has been used for over 25 years, according to former committee staff members . . .") [hereinafter *Staff Memorandum*].

<sup>10</sup> *Id.* (describing how the concept of senatorial courtesy produced "the institutionalization of the 'blue slip,' whereby the Judiciary Committee formally invites senators from a nominee's home state to disclose opinions and information concerning the nomination").

<sup>11</sup> *Id.* (citation omitted).

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

<sup>13</sup> No mention of blue slips is made in the rules posted on the Judiciary Committee's website. See *Senate Judiciary History*, at <http://www.senate.gov/~judiciary/rules.htm> (last visited Aug. 6, 2001).

hearing has been scheduled on a nominee in the absence of a returned blue slip" rendering it "an automatic and mechanical one-member veto over nominees."<sup>14</sup>

The staff noted that presidents "can ignore a senator's personal opposition and attempt to have his nomination confirmed by the Senate,"<sup>15</sup> but the memorandum also hit upon the power of the blue slip — and what makes it so difficult to study. "Generally," continued the memo, "conflicts are resolved *before* a name is submitted. In other cases, the nomination may die in committee without any record on whether a withheld blue slip was responsible."<sup>16</sup>

Senator Kennedy tried to rein in the custom when he assumed the chairmanship of the Judiciary Committee. In his opening statement to the 1979 hearings on filling judicial vacancies caused by the passage of the Omnibus Judgeship Act, Senator Kennedy stated that he would not "unilaterally table a nomination simply because a blue slip is not returned by a colleague."<sup>17</sup> He conceded, however, that he could not "discard cavalierly the tradition of senatorial courtesy, exception-riddled and outdated as it may be."<sup>18</sup> Therefore, in the absence of a blue slip, he proposed to bring the nomination before the Committee for a vote on whether or not to proceed,

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<sup>14</sup> Staff Memorandum, *supra* note 9, at 119. According to Attorney General Griffin Bell, in testimony given before the Committee, the custom of a senator's not returning a blue slip may have originated when Senator Richard Russell was forced to declare on the Senate floor that a particular nominee for a district judgeship was "personally obnoxious" to him, after his nominee for the position was passed over by President Truman. *See Senate Hearing, supra* note 6, at 26-27 (statement of Attorney General Griffin Bell). Apparently, Senator Russell had entreated Truman's nominee not to accept the nomination, since Russell had already promised the position to someone else, and would be forced to oppose the president's nominee. *Id.* Attorney General Bell said that, at the time, a senator could not just hold on to the blue slip, but added that he opposed that practice because of the potential for abuse. *Id.*

<sup>15</sup> Staff Memorandum, *supra* note 9, at 120 ("There is obviously a difference between a conflict which occurs before the President normally submits a name for confirmation and one which occurs either in the committee or on the floor of the Senate.").

<sup>16</sup> *Id.* In his opening statement before the Committee, Senator Dennis DeConcini commended Senator Kennedy for having an open debate on the blue slip, characterizing it as "very difficult to even talk about in the open." *Senate Hearing, supra* note 6, at 8 (statement of Senator DeConcini). Testifying before the Committee, a member of Common Cause complained that the secrecy was what made the blue slip process so damaging: "[W]hen it happens nothing else happens." *Id.* at 75 (statement of David Cohen). Mr. Cohen stated the position of Common Cause that "any senator who opposes a Federal judicial nominee should present his or her opinions at the public confirmation hearings . . . . No senator should be allowed to blackball a nominee." *Id.* at 64 (statement of David Cohen).

<sup>17</sup> *Id.* at 4 (statement of Senator Kennedy).

<sup>18</sup> *Id.*

“rather than letting the nomination die . . . .”<sup>19</sup> Thus, said Kennedy, “[t]he committee, and ultimately the Senate, can work its will.”<sup>20</sup>

The “will,” however, that his colleagues — particularly those in the minority party — seemed inclined to “work” was not necessarily in concert with Kennedy’s reforming spirit. In his opening statement, which was read by Senator Paul Laxalt, Strom Thurmond “presume[d] that the committee will honor the blue-slip system that has worked so well in the past.”<sup>21</sup> Not only was this “a matter of senatorial courtesy,” but it was also a “means of an effective scrutiny of a candidate . . . .”<sup>22</sup> Thurmond’s statement noted that “on many occasions [the blue-slip process had] provided insight on a nominee not otherwise presented.”<sup>23</sup>

In the hearings that followed, Senator Thurmond peppered Attorney General Bell with questions about whether the Carter Administration would proceed with nominees who lacked the support of *both* of the nominee’s home state senators. When Thurmond “presume[d]” that the Administration would observe the “longstanding custom” of the Committee and “would confer with both Senators before even submitting a nomination to the Senate,”<sup>24</sup> Bell demurred: “Well, that would get down to whatever the Senate is going to do about the blue slip . . . .”<sup>25</sup> He continued, “If there were no blue slip procedure and we wanted to send a name in . . . I have to say, frankly, we would.”<sup>26</sup> Thurmond then reminded Bell that doing so “would be reversing the whole precedence and customs in the past” and again “presume[d] that [the Administration] would not want to do that.”<sup>27</sup> Bell merely replied that he was “waiting on the Senate Judiciary Committee to tell [him] what the rule is.”<sup>28</sup>

During his time, Senator Laxalt vigorously defended the blue slip, claiming that the procedure was the victim of “an erroneous perception” and, while admitting he had “not run the history on this,” he “suspect[ed] . . . [that] it has been rarely utilized,” and then only as a last resort.<sup>29</sup> As Senator Laxalt saw it, the issue was one of Senate responsibility:

If we finally get through a selection process and somebody comes down here who . . . is obnoxious or otherwise is not acceptable, I think, as a

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 5 (statement of Senator Thurmond, read by Senator Laxalt).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 23 (statement of Senator Thurmond).

<sup>25</sup> *Id.* (statement of Attorney General Bell).

<sup>26</sup> *Id.* (statement of Attorney General Bell).

<sup>27</sup> *Id.* (statement of Senator Thurmond).

<sup>28</sup> *Id.* (statement of Attorney General Bell).

<sup>29</sup> *Id.* at 26 (statement of Senator Laxalt).

matter of senatorial responsibility, we should preserve [senators' rights to withhold the blue slip]. I feel strongly about the blue slip process, since it has not been abused, that it should be retained. I hope personally that I never have to utilize it, but I never want to foreclose myself or any of my colleagues in the right case from being able to do that.<sup>30</sup>

That responsibility "to call these tough shots within our States," he added, was "why we are here . . . ."<sup>31</sup>

David Cohen, of Common Cause, disagreed, stating unequivocally his organization's position that "the archaic blue slip system" had "turned on its head" the Constitution's allocation of responsibility for nominations and confirmations.<sup>32</sup> "The advice and consent authority," he argued, "has been consolidated in individual senators, denying the entire Senate and the President their constitutional roles."<sup>33</sup> The blue slip process "serves narrow political aims and should be abandoned."<sup>34</sup>

Aside from the Judiciary Committee hearing discussed above, the only other extensive treatment of the blue slip — and senators' attitudes toward it — is found in an excellent article by political scientist Elliott Slotnick, published in *Judicature*<sup>35</sup> around the same time as the Senate hearings. Apparently, President Carter's decision to employ merit selection panels to fill judicial vacancies,<sup>36</sup> and Senator Kennedy's assumption of the chair of the Judiciary Committee, heralded an era of senatorial *glasnost* regarding its practices, for Slotnick was able to draw on interviews with senators and their staff members regarding judicial selection, including the blue slip process.

"It was the blue slip procedure," wrote Slotnick, "that institutionalized senatorial courtesy within the Judiciary Committee and created a kind of 'pocket veto' of judicial nominees for home state senators of both parties."<sup>37</sup> In recent years (as is evidenced by the comments in the Judiciary Committee), it had become "a major target for the reform groups."<sup>38</sup> But Slotnick's research tended to confirm Senator Laxalt's point that it had not been used that often, and had not been abused by members: "Surprisingly . . . our data reveal that it has not been used very frequently in the manner which its critics fear. Indeed, 88 percent of our

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 63 (statement of David Cohen).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 62 (statement of David Cohen).

<sup>35</sup> See Slotnick, *supra* note 6.

<sup>36</sup> See GOLDMAN, *supra* note 8, at 236-84 (discussing judicial selection during the Carter Administration).

<sup>37</sup> Slotnick, *supra* note 6, at 63.

<sup>38</sup> *Id.* at 69.

respondents indicated that they had *never* used the blue slip process for *any* purpose other than signing off or commenting favorably on a nominee."<sup>39</sup>

Of the six respondents that had withheld blue slips, only two did not eventually return it.<sup>40</sup> This suggested to Slotnick that "withholding the blue slip was a delaying tactic which allowed [senators] to make further inquiry and to negotiate on the vacancy — the 'classic' use of the blue slip."<sup>41</sup> The two who never returned the blue slip were anomalies; for Slotnick, their withholding constituted a "breakdown in the 'normal' flow of the advice and consent process . . . . Problems with home state senators presumably will be dealt with *before* the need for withholding a blue slip arises."<sup>42</sup> (Of course, the *threat* to withhold a blue slip, like the threat to filibuster, can achieve the same end result, if the threat is taken seriously, and the nomination is never made by the president in the first place. Requiring pre-clearance of nominees with home state senators itself represents a potential limitation on the president's power to appoint. As Griffin Bell admitted to the Judiciary Committee,<sup>43</sup> without the blue slip a president would not have as much incentive to consult.).<sup>44</sup>

The most interesting aspect of Slotnick's research was the "blue slip for me, but not for thee" attitude of many senators. While a majority of the senators he surveyed favored the retention of the blue slip process, a larger majority indicated that their decision to support a nominee or not would *not* be dictated by a colleague's decision to withhold the blue slip.<sup>45</sup> Even among those senators who *favored* retaining the process, thirty-nine percent would not defer to colleagues exercising their blue slip prerogative.<sup>46</sup> To Slotnick, this signaled a degradation of certain cherished Senate norms, like reciprocity and courtesy.<sup>47</sup> While those were in evidence in some members' offices, "for the majority of senators, the blue slip was a device which they might or might not want to have at their disposal, but one

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *supra* notes 25-28 and accompanying text.

<sup>44</sup> See Staff Memorandum, *supra* note 9, at 23.

<sup>45</sup> See Slotnick, *supra* note 6, at 70 ("A majority (57 percent) favored the continued existence of the blue slip process; 32 percent thought that the process should be eliminated or the Kennedy reform initiative should be supported"; but 62 percent "also indicated that they would *not* defer as a matter of course to their colleagues' attempt to block a nomination by withholding a blue slip.").

<sup>46</sup> *Id.*

<sup>47</sup> The classic account of the norms of the Senate — identified as apprenticeship, legislative work, specialization, courtesy, reciprocity, and institutional patriotism — is found in DONALD MATTHEWS, U.S. SENATORS AND THEIR WORLD 94-117 (1960). These Senate "folkways" are summarized and described briefly in Denning, *Reforming the New Senate Confirmation Process*, *supra* note 1, at 15.



which they were clearly uncomfortable about in the hands of their colleagues. This inconsistency appeared again and again in our interviews," he wrote.<sup>48</sup> He might have added that, if forced to choose, most senators would evidently support their colleagues only to ensure that *their* exercise of the prerogative would be supported in the future.

If so much distrust surrounded the procedure, then why had it been retained? For some, wrote Slotnick, tradition was enough.<sup>49</sup> Others suggested that its presence preserved consensus and harmony among senators by offering an "early warning" system of sorts that could help avoid embarrassing and acrimonious controversies from occurring either in Committee or on the Senate floor.<sup>50</sup> Still other senators invoked the historic reason for deferring to senators' wishes regarding nominees: home state senators are in the best position to evaluate a nominee and provide unique insights.<sup>51</sup> One obvious reason for retaining the custom is that it forces an administration — even if of a different party than the senator — to deal directly with that senator on judicial nominations, thus enhancing her prestige. Perhaps even more important is the fact that it ensures that senators of the minority party can play a significant role in the nomination process. Not surprisingly, ninety-four percent of Republicans responding to Slotnick's study favored retaining the blue slip process.<sup>52</sup> "The minority party," he concluded, "will apparently do whatever is necessary to maintain a meaningful role in the judicial recruitment process."<sup>53</sup>

Still, despite the controversy generated by the process, Slotnick was able to conclude in 1980 that "the blue slip system is rarely used and it often serves some other purpose than defeat of a nominee. Its major function seems to be to delay, not to defeat, a nomination."<sup>54</sup> Members continued to support it because it was a Senate custom; because they were more senior; because it helped secure "state's rights"; because they were members of the minority party; or some combination thereof.<sup>55</sup>

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<sup>48</sup> Slotnick, *supra* note 6, at 70 ("[M]ost of our respondents were satisfied that they wouldn't use the blue slip procedure arbitrarily, yet they were not willing to make the same assumption about their colleagues."); see also Denning, *Reforming the New Senate Confirmation Process*, *supra* note 1.

<sup>49</sup> Slotnick, *supra* note 6, at 70-71.

<sup>50</sup> *Id.* at 71.

<sup>51</sup> *Id.* Senator Thurmond offered this as a reason for retaining the custom. See *supra* note 23 and accompanying text. There should be some question how salient this point remains. It is difficult to imagine that a senator would have more insight into, say, a candidate for a Court of Appeals position than others who might know the nominee, or have worked with her. Such was, perhaps, not the case at one time, when the potential nominees constituted a much smaller pool.

<sup>52</sup> See Slotnick, *supra* note 6, at 71.

<sup>53</sup> *Id.* at 73.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

Slotnick sensed, however, that as “the blue slip stalwarts . . . become fewer . . . the Kennedy reform[s] may begin to take hold.”<sup>56</sup>

As it happened, predictions of the blue slip’s demise were premature. As I show in the next section, the process survived the reform impulse of Kennedy’s tenure as chair of the Senate Judiciary Committee,<sup>57</sup> and enabled Republican senators to vex Clinton Administration nominees<sup>58</sup> until the election of George W. Bush to the presidency. Following his election, when (albeit temporarily) Republicans controlled both the executive and the legislative branches, a dispute again arose over the blue slip, and it again gained public attention.

## II. THE BUSH ADMINISTRATION’S BLUE SLIP BLUES

The emotional aftermath of the 2000 election meant that confirmation for Bush’s nominees, his judicial nominees in particular, would be rough going.<sup>59</sup> Some commentators even called on the Senate not to confirm *any* Supreme Court nominees, exhorting Senate Democrats to vigorously oppose “judicial ideologues intent on a revolutionary agenda.”<sup>60</sup> For their part, Democrats in the then-evenly-divided Senate were demanding that the president respect the blue slip procedure by agreeing to consult Democratic senators prior to nominating persons from their

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<sup>56</sup> *Id.*

<sup>57</sup> There is some recent evidence suggesting that the senator’s *own* reformist tendencies did not survive the 2000 election. In response to a question whether the Democrats would treat Bush’s judicial nominees fairly, Kennedy is reported to have replied, “Two words [*sic*] — Bill Lann Lee.” Editorials, *LAS VEGAS REV. J.*, June 16, 2001, at 10B. In May, Kennedy complained that the administration had not consulted with Democrats about its first round of judicial nominees. Associated Press, *Bush Judicial Nominees Face Tough Time*, *ARIZ. REPUBLIC*, May 5, 2001, at A18 (quoting Kennedy, who complained that “[t]here was no consultation, no indication, no suggestion . . . Members want to make sure that doesn’t happen again.”) (internal quotation marks omitted).

<sup>58</sup> During the years that the Republicans controlled the Senate during the Clinton Administration (1995-2000) “it brought judicial confirmations to a virtual standstill throughout . . . 1996 (confirming . . . only seventeen judgeships) and again for most of 1997 (confirming thirty-six in all); and in 1998 and 1999 it confirmed a smaller percentage of Clinton’s judicial nominees than it did in the corresponding years in the Reagan and Bush administrations.” GERHARDT, *supra* note 3, at 114. This is in spite of Clinton’s genuine effort to consult with senators and to avoid controversial nominees. *Id.* at 122-23. At least some of these failed nominations came at the hands of Senator Jesse Helms, who single-handedly blocked all of President Clinton’s nominations to the Fourth Circuit. *Id.* at 153.

<sup>59</sup> See, e.g., CNN, *Court Vacancies Unlikely to be Filled Soon*, Mar. 26, 2001, at <http://www.cnn.com/2001/ALLPOLITICS/03/26/bush.judges.ap/index.html> (suggesting that the evenly-divided Senate will make quick confirmation of judicial appointments difficult).

<sup>60</sup> Bruce Ackerman, *Foil Bush’s Maneuvers for Packing the Court*, *L.A. TIMES*, Apr. 26, 2001, available at <http://www.latimes.com/news/comment/20010426/t000035062.htm>.

state to judgeships.<sup>61</sup> Democrats on the Judiciary Committee were angered by then-Chairman Orrin Hatch's plan to require *both* home-state senators to withhold slips before sinking a nomination, which Democrats alleged was an abrupt change in the way Hatch had treated blue slips during the Clinton Administration.<sup>62</sup>

The issue became so contentious that Democrats, furious at Republican refusals to adhere to past practices, staged a walk out that delayed a vote on the nominations of President Bush's nominees for solicitor general and deputy attorney general.<sup>63</sup> Then-minority leader Daschle raised the stakes by declaring that Democrats in the Senate would "block Senate votes on judicial nominations unless both senators from the nominee's home state [were] willing to go along with the choice."<sup>64</sup> In other words, the Democrats were threatening either to place holds on or filibuster Bush judicial nominations, unless they were assured that Democrats in states whose delegations were split would have the opportunity to blue-slip judicial nominees to whom they objected — which would ensure that the administration would have an incentive to consult with Democrats before formally announcing nominations.<sup>65</sup>

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<sup>61</sup> See Thomas B. Edsall, *Democrats Push Bush for Input on Judges*, WASH. POST, Apr. 28, 2001, at A4 (describing letter from Democratic members of the Senate Judiciary Committee to White House Counsel Albert Gonzales "urg[ing] the administration not to weaken senators' leverage over nominees from their home states").

<sup>62</sup> See Neil A. Lewis, *Washington Talk: Democrats Ready for Judicial Fight*, N.Y. TIMES, May 1, 2000, available at <http://www.nytimes.com/2001/05/01/politics/01TALK.html> (describing Democrats' opposition to Republican plans to abolish or change the blue-slip policy); see also Nicholas Confessore, *This Time, It's Personal*, AM. PROSPECT, June 4, 2001, at 1314:

At a confirmation hearing in early April, Hatch had hinted that he might change [the blue slip procedure]. During the Clinton years any one senator could block any candidate from his or her home state . . . under George W. Bush, Hatch informed the Democrats, a veto would require the opposition of both home-state senators — a substantial dilution of a treasured prerogative of office.

When NPR Reporter Nina Totenberg confronted [Senator Patrick] Leahy . . . with Hatch's statement, Leahy reportedly swore, informed Totenberg that "we'll follow the rule the same way Senator Hatch followed it during the last six years," and stalked off to find his Republican colleague.

*Id.*

<sup>63</sup> See Helen Dewar & Thomas B. Edsall, *Democrats Block Picks for 2 Justice Posts*, WASH. POST, May 4, 2001, at A10; Byron York, NATIONAL REVIEW ON LINE, May 3, 2001, at <http://www.nationalreview.com/york/yorkprint050301.html>.

<sup>64</sup> Dewar & Edsall, *supra* note 63; Helen Dewar, *Daschle Warns GOP on Judicial Confirmations*, WASH. POST, May 3, 2001, at A19.

<sup>65</sup> In California, the Bush Administration has already worked out a system for ensuring that its nominees from that state will not be blocked by both of the state's Democratic senators. In brief, six-member, bipartisan nominating commissions were set up with three

Published reports about the blue slip and its function in the confirmation process were rather vague. Reporters for the *Washington Post* described it only as a custom that “dates back at least several decades and is rooted in the tradition of ‘senatorial courtesy,’ which traces its roots to the presidency of George Washington.”<sup>66</sup> It was also unclear from published reports whether failure to return a blue slip was a death blow to a nomination, as Democrats claimed; or, as Senator Hatch argued, “never an absolute bar to proceeding with a nomination . . . .”<sup>67</sup> While the question whether Hatch would or would not follow through on his apparent *volte face* was mooted with Senator Jim Jeffords’ defection from the GOP, which returned control of the Senate to the Democrats, the issue of the blue slip and its role in the confirmation process did not go away.

A few days after control switched to the Democrats, the blue slip again made the news when California Senator Barbara Boxer announced her intent to use her prerogative to nix the nomination of California Representative Christopher Cox to the Ninth Circuit Court of Appeals.<sup>68</sup> As a result, Cox asked President Bush to withdraw his name from consideration.<sup>69</sup> Paul Gigot and William Safire criticized Boxer’s move, and criticized the blue slip process, likening it to a “blackball”<sup>70</sup> and a “burial shroud”<sup>71</sup> for nominees.

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Democrats and three Republicans to recommend judicial nominations in each of California’s four judicial districts. To be passed on to the White House, a nominee must receive at least four of the committee’s votes. See *Democrats, Bush Agree on Calif. Judges*, L.A. TIMES, May 30, 2001, at A4. Some California Republicans were less than pleased with the arrangement. See Ralph Z. Hallow, *Veto-Sharing Deal on Judges Irks GOP’s Right*, WASH. TIMES, June 1, 2001, at A8.

<sup>66</sup> Dewar & Edsall, *supra* note 63, at A10.

<sup>67</sup> Editorial, *More Converts in the Senate*, WASH. POST, May 9, 2001, at A30 (decrying practice of blue slips; chiding Senator Hatch for hypocrisy for claiming that Democrats were seeking individual vetoes on presidential nominations: “Mr. Hatch’s virtue is . . . recently acquired . . . . Sen. Hatch once held up hearings on all President Clinton’s judicial nominees until a Hatch favorite in Utah won a slot.”). See also Dewar, *supra* note 64 (“Democrats contend that . . . Orrin G. Hatch . . . allowed Republicans to veto President Bill Clinton’s nominees from their home states but is now refusing Democrats that power. Hatch contends that a negative response from a senator was determinative only if the administration failed to consult with both senators from the state before the nomination.”).

<sup>68</sup> See Paul Gigot, *How Feinstein is Repaying Bush on Judges*, WALL ST. J., May 9, 2001; see also William Safire, *Battle of the Blue Slips*, N.Y. TIMES, May 10, 2001, available at <http://www.nytimes.com/2001/05/10/opinions/10SAFLhtml>.

<sup>69</sup> Associated Press, *Cox Pulls Name from Consideration*, N.Y. TIMES, May 25, 2001, available at <http://www.nytimes.com/apoline/national/AP-Bush-Judges.html>.

<sup>70</sup> See Gigot, *supra* note 68; Safire, *supra* note 68.

<sup>71</sup> Safire, *supra* note 68 (“In olden times, the nomination . . . died [if a senator failed to return a blue slip]. No hearing; no vote; the unreturned blue slip was a form of burial shroud.”). Safire went on to describe how “[i]n the 80’s, under the chairmanship of Ted Kennedy and later Joe Biden, a little wiggle room was allowed: a nominee, despite being

Whether or not the non-return of a blue slip would be the death knell for judicial nominees became one of the most hotly contested issues confronting the Senate as it set about reorganizing following the assumption of control by the Democrats. What followed was an outbreak of *chutzpah* on both sides: Republicans demanded floor votes on all of the president's judicial nominees, regardless of whether they received a favorable vote in committee; Democrats refused such blanket assurances, claiming that such a move would undermine the Senate's "advice and consent" role.<sup>72</sup> In particular, Republicans were looking for a guarantee that "President Bush's choices for the Supreme Court come before the full Senate for consideration even if defeated in committee."<sup>73</sup>

The new majority leader, Senator Daschle, then agreed to hold votes on that issue and a vote on whether the blue slip policy would be continued, as well as whether the non-return of blue slips would be made public.<sup>74</sup> In the end, Democrats only assured Republicans that they would follow the "tradition of bringing Supreme Court nominees to the Senate floor but stopped short of any iron-clad commitments."<sup>75</sup> Republicans, however, did get an agreement that all blue slips would be made public.<sup>76</sup>

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blue-slipped by the home-state senator, could theoretically get a hearing provided the president begged the senator's permission in advance." *Id.*

<sup>72</sup> See Associated Press, *Republicans Seek Deal on Judgeships*, N.Y. TIMES, June 3, 2001, available at <http://www.nytimes.com/apoline/national/AP-Senate-Judges.html>; CNN, *GOP Rejects Democratic Offer on Reorganizing Senate*, June 1, 2001, at <http://www.cnn.com/2001/ALLPOLITICS/05/31/senate.democrats/index.html> (describing Republican rejection of Democrats' proposal for reorganizing Senate); CNN, *GOP Leader Warns of Senate Reorganization Wrangle*, June 3, 2001, at <http://cnn.com/2001/ALLPOLITICS/06/03/senate.reorganization/index.html>.

<sup>73</sup> Alison Mitchell, *New Senate Leader Agrees to Hold Votes on 2 Judicial Issues*, N.Y. TIMES, June 20, 2001, available at <http://www.nytimes.com/2001/06/20/politics/20SENA.html>.

<sup>74</sup> *Id.*

<sup>75</sup> Helen Dewar, *Senate Reorganization Finalized; Democrats Pledge to Follow Tradition on Court*, WASH. POST, June 30, 2001, at A11.

<sup>76</sup> See Dave Boyer, *Senate Concurs on Reorganization; GOP Fails to Win Pledge on Judges*, WASH. TIMES, June 30, 2001, at A4; Dewar, *supra* note 75. Interestingly, prior to getting the agreement, which was memorialized in a joint "Dear Colleague" letter from Vermont Senator Patrick Leahy and Orrin Hatch, the outgoing chair of the Judiciary Committee, the Republicans have "abandoned their earlier demand for a vote on it." *Id.* See also Opening Statement of Senator Patrick Leahy, Chairman, Senate Judiciary Committee, July 19, 2001, 2001 WL 21757508 ("On June 29 Senator Hatch and I jointly sent a Dear Colleague letter to the Senate declaring that blue slips would be treated as public information . . . I well recall the discussion in the Committee in early 1997 when Senator Durbin called for making blue slips public. I am glad that we have been able to move forward toward a policy of openness in this regard . . ."). The Department of Justice's Office of Legal Policy has placed a page on its website listing all senators and whether any has a blue slip outstanding on nominees to the court of appeals or the district court. See

News coverage of the Senate spat did raise the visibility of the blue slip, and also exposed it to criticism.<sup>77</sup> However, the coverage did not do much to explain its origins or past practice; some coverage seemed to confuse it with the “hold.” It is nevertheless instructive to compare the blue slip process *circa* 2001 with the process as described by Slotnick above. Though the secrecy shrouding the process — which has only recently been lifted<sup>78</sup> — makes it difficult to say for sure, it appears that, in the past ten years, the fears of the blue slip’s critics have been realized.

If Senator Helms’s continued obstruction of any North Carolina nominees to the Fourth Circuit, and Senator Boxer’s treatment of Christopher Cox, are at all representative, the blue slip is now seen as a means to defeat, not merely delay, a nominee and perhaps prevent the nomination from being made in the first place. Such an evolution is not without a precedent: witness the hold’s evolution from an accommodation to members who cannot be present for a debate to a blue slip process writ large, in which legislation *and* nominees can be held up by any senator, for any reason, as long as the leadership decides to honor the hold.<sup>79</sup> That she chose

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<http://www.usdoj.gov/olp/blueslips1.htm> (last visited Nov. 6, 2001). This will ensure against Senate backsliding on the promise to make all blue slips public, and will provide scholars with valuable information on the frequency with which blue slips are withheld and for how long. It would be interesting to see, for example, whether the withholding of blue slips *in general*, and their withholding in an effort to *defeat* (as opposed to *delaying*) a nominee are more intense during periods of divided government. My thanks to Glenn Reynolds for alerting me to the blue slip page on the DOJ’s website.

<sup>77</sup> In general, editorial commentary was uniformly negative, with many newspapers calling for its abolition. At least, they argued, blue slips should be made public, as they eventually were under the Senate’s reorganization plan. See Editorial, *Democracy Still on Hold*, OMAHA WORLD-HERALD, July 3, 2001, at 12 (calling Senate blue slip reforms “a small victory for openness. Repeat, small victory.”); Editorial, *Senate Democrats’ Generosity*, ST. PETERSBURG TIMES, June 25, 2001, at 6A (“The blue-slip veto should be abolished.”); Editorial, *Judicial Nominees*, FT. WORTH STAR-TELEGRAM, June 20, 2001, at 14 (“If Democrats really wanted to avoid retaliation for perceived slights of Clinton nominees, they would purge the process of this relic of senatorial courtesy.”); Editorial, *Speed Naming Federal Judges*, SUN-SENTINEL (Ft. Lauderdale, FL), May 31, 2001, at 24A (“Toss that blue slip. Don’t let any single senator block a confirmation vote. That’s downright discourteous to the president, the nominee, other senators, federal judges, and the American people.”); Editorial, *Justice Not Served by Partisan Process*, TENNESSEAN (Nashville, TN), May 13, 2001, at 20A (urging cooperation on judicial appointments); Richard Bond, *The Senate’s Hidden Power*, WASH. TIMES, June 5, 2001, at A19 (suggesting that President Bush “[a]sk the Senate to abandon the blue slip system as the unfair, outdated political tool it has become. And demand that in the future, those senators who object to a nomination make their case in public and on paper to the president.”); Jonathan Turley, *Seeing Red on Blue Slips*, L.A. TIMES, May 16, 2001, at B13 (“Blue slipping would make a petty despot blush.”).

<sup>78</sup> See *supra* note 76 and accompanying text.

<sup>79</sup> For extensive discussion of the hold, see Denning, *Reforming the New Confirmation Process*, *supra* note 1, at 20-22.

to threaten withholding her blue slip on ideological grounds, as opposed to any other manifest unfitness for office, suggests that Senator Boxer was taking advantage of an established practice. That is, in none of the news reports was she criticized by her colleagues for breaking with tradition. While conservative pundits criticized her action, they seemed to take it only as a symptom of the problem with the custom itself. All of this suggests that the Republicans likely used the blue slip process in the same way.

Moreover, the withdrawal of Cox from consideration demonstrates the real power of the blue slip: a senator need not use it in a direct confrontation with the administration over a nominee. Just letting it be known that the senator is opposed and would, if the person is nominated, withhold the blue slip, sends a powerful signal that trouble is in the offing. Then the administration must decide whether or not it wants to pick a fight. With judicial nominations, then, the Senate has created an effective procedure for ensuring that its “advice” is sought by the president prior to the announcement of a nomination, despite suggestions that that function has been “short-circuited.”<sup>80</sup>

### III. IS THE BLUE SLIP PROCESS CONSTITUTIONAL?

Elliott Slotnick noted twenty years ago that the blue slip process was inconsistent with a “minimalist” view of the confirmation process.<sup>81</sup> To be sure, its presence represents a rather more complicated picture of nomination and confirmation than that suggested by Article II. But is it — and the delays for nominees that it produces — unconstitutional?<sup>82</sup> While I conclude that the blue slip process and the senatorial courtesy norm that it enforces cannot find explicit sanction in the Constitution, the evidence for its proscription by the Constitution is lacking as well.

Article II, of course, grants presidents the power to nominate judges, who are appointed when they obtain the “advice and consent” of the Senate.<sup>83</sup> Defending the system in *The Federalist*,<sup>84</sup> Hamilton praised it for its transparency and its clear

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<sup>80</sup> Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 *YALE L.J.* 657, 659 (1969); see also Denning, *Reforming the New Confirmation Process*, *supra* note 1, at 38-41 (exploring ways for Senate to render advice on all appointments, not just judicial appointments).

<sup>81</sup> Slotnick, *supra* note 6, at 73.

<sup>82</sup> See, e.g., Lee Renzin, Note, *Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible?*, 73 *N.Y.U. L. REV.* 1739 (1998) (suggesting that courts should intervene to prevent untoward delays); Sam Williamson, *Why Delay in the Senate’s Consideration of Judicial Nominees Violates the Constitution*, WRIT, Aug. 23, 2001, available at [http://writ.news.findlaw.com/commentary/20010823\\_williamson.html](http://writ.news.findlaw.com/commentary/20010823_williamson.html).

<sup>83</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>84</sup> See *THE FEDERALIST* NO. 77, at 432 (Alexander Hamilton) (Isaac Kramnick ed., 1987)

allocation of responsibility.<sup>85</sup> Everyone knew that the president was responsible for the persons appointed, but that the Senate provided an additional layer of review.<sup>86</sup> With the roles clearly assigned and the matter conducted with publicity, Hamilton wrote, the result would be that “[t]he blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate . . . .”<sup>87</sup> Hamilton contrasted the appointment mechanism of the Constitution with New York’s Counsel of Appointment, where, because it was unclear what part anyone played in proposing or approving nominations, “[t]he censure of a bad appointment, on account of the uncertainty of its author and for want of a determinant object, has neither poignancy or duration.”<sup>88</sup> Moreover, because of the secrecy in which the Counsel operated, and its small size, “an unbounded field for cabal and intrigue lies open” and “all idea of responsibility is lost.”<sup>89</sup>

One might say the same about the blue slip process. First, it dilutes the power of the executive to appoint whomever he wishes.<sup>90</sup> Knowing of the blue slip process, and of senators’ expectations that the president will appoint their people for certain posts, can we assign unqualified responsibility to the president for those appointments? Second, the secrecy with which the blue slip operates (or operated, if the present agreement holds) also diffuses responsibility and reduces transparency in the process. If a senator can withhold a blue slip, give no reason, and the public knows nothing about it, what is the check upon extreme abuses, like those seen during the Clinton Administration? But the most serious constitutional objection

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(hereinafter, all citations are to this edition).

<sup>85</sup> *Id.* at 433 (“[In the Constitution], the power of nomination is unequivocally vested in the Executive. And as there would be necessity for submitting each nomination to the judgment of an entire branch of the legislature, *the circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety, and the public would be at no loss to determine what part had been performed by different actors.*”) (emphasis added).

<sup>86</sup> See THE FEDERALIST NO. 76, at 430 (Alexander Hamilton) (writing that Senate confirmation “would have a powerful . . . operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 434.

<sup>89</sup> *Id.*

<sup>90</sup> While senatorial courtesy has long dictated that presidents consult with senators about appointments made to positions inside their own home states, that norm usually only operated with great force when the senator and the president were of the same party. See Harris, *supra* note 3, at 39 (“The custom of senatorial courtesy is the sanction by which a majority of the Senate may require the President to nominate the candidate proposed by the senator or senators from the state in which the office is located, provided they belong to the same party as that of the President.”).



is that it allows *individuals* to exert what is supposed to be an *institutional* check. A single senator withholding consent, and depriving the Senate as a body from voting a nominee up or down, is difficult to square with the Constitution, which specifies that it is the *Senate* (not “senators”) which is to provide “advice and consent.”<sup>91</sup> While the Constitution authorizes the Senate to make its own rules,<sup>92</sup> recall that there has not been a formal rule from the Judiciary Committee authorizing the rule for nearly a half century.<sup>93</sup>

On the other hand, the Senate is not only expected to “consent” to nominations, but also to give “advice” regarding them. The Constitution, of course, does not explicitly set forth an advice-giving mechanism, but the text does anticipate more than a rubberstamp role for the Senate.<sup>94</sup> To put it another way, the Constitution establishes an expectation that the president will actively seek the guidance of senators in making appointments. But since the power to appoint is clearly vested by the Constitution in the president, and there is no mention of *how*, exactly, he is supposed to obtain the advice of the Senate,<sup>95</sup> there is no way to assure that he will do so. Moreover, because he alone is vested with the power to appoint, it is unlikely that the Senate could persuade a court to invalidate a presidential nomination on the grounds that it was made without sufficient advice from the Senate.<sup>96</sup> Thus, in the absence of an effective legal sanction, the Senate had to create a sanction that would penalize a president’s refusal to seek Senate advice. The Senate decided to “encourage” him to consult with them by creating a way to sanction him if he does not — the blue slip.

The next section explores further the notion that the blue slip represents the Senate’s institutionalized sanction for presidential deviation from senatorial courtesy by employing concepts developed in recent legal literature on cooperation in the absence of legal sanction through the development and use of social norms.

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<sup>91</sup> Of course, the Senate cannot act but through its members; the point is that allowing two out of 100 to scuttle a nomination does not square with the majority rule requirement implied by Article II.

<sup>92</sup> U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

<sup>93</sup> See *supra* note 13 and accompanying text.

<sup>94</sup> GERHARDT, *supra* note 3, at 26.

<sup>95</sup> Cf. U.S. CONST. art. II, § 2, cl. 1 (“The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .”).

<sup>96</sup> See *Baker v. Carr*, 369 U.S. 186 (1962) (describing as one case in which nonjusticiable “political question” arises where Constitution clearly commits power to another branch of government); cf. *Nixon v. United States*, 506 U.S. 224 (1993) (refusing to inquire whether procedure whereby impeachment trial of judge handled by less than whole Senate violated the Constitution; power to try impeachments committed by the Constitution to the Senate and not subject to judicial review).

#### IV. THE BLUE SLIP AS SANCTION FOR VIOLATION OF CONFIRMATION NORMS

##### A. *Institutional Norms and Their Enforcement*

There is a growing body of literature that uses law-and-economics to describe how and why people cooperate in the absence of legal sanction and how non-legal “norms” are derived and enforced in communities.<sup>97</sup> Though even among the specialists in this area, there is no one agreed upon definition for a “norm,” most agree that it is a behavioral expectation, deviation from which may call down a sanction from the community in which the norm is operative.<sup>98</sup> In order to achieve cooperation from other members of the relevant community, we all publicize our adherence to social norms by engaging in (or abstaining from) behaviors regulated by the norms through activities known as “signaling.”<sup>99</sup> Thus, as Eric Posner puts it, we signal to one another our status as people of the “good” type, and thus can be counted on to cooperate in any contemplated relationship, as contrasted with untrustworthy people of the “bad” type.<sup>100</sup>

As Michael Gerhardt has recently demonstrated, one might also extend norm theory to an institutional relationship, like that of the president to the Senate in the confirmation process.<sup>101</sup> Within the subclass of institutional norms, he writes, “is a subset that involves the behavioral regularities of the leaders of national political institutions over shared areas of responsibility, including . . . appointments

<sup>97</sup> See, e.g., ROBERT ELLICKSON, *ORDER WITHOUT LAW* (1991); ERIC POSNER, *LAW AND SOCIAL NORMS* (2000); see also CASS SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* (1997).

<sup>98</sup> See POSNER, *supra* note 97, at 34 (“Social norms describe the behavioral regularities that occur in equilibrium when people use signals to show that they belong to the good type.”); SUNSTEIN, *supra* note 97, at 38-39 (offering as a rough definition “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done . . . . Social norms are enforced through social sanctions . . . .”).

<sup>99</sup> See POSNER, *supra* note 97, at 18-19.

<sup>100</sup> *Id.* at 19:

To distinguish themselves from bad types, good types engage in actions that are called ‘signals.’ Signals reveal type if only the good types, and not the bad types, can afford to send them, and everyone knows this. Because a good type is a person who values future returns more than a bad type does, one signal is to incur large, observable costs prior to entering a relationship.

*Id.*; see also RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 291-92 (2001) (noting that public knowledge of conformity with norms benefits conforming individual because it signals her status as a reliable transacting partner).

<sup>101</sup> See Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687 (2001).

matters.”<sup>102</sup> He further defines these institutional appointments norms as the “behavioral regularities of presidents and senators regarding appointments that persist in the absence of formal rules and that deviations from which trigger sanctions.”<sup>103</sup> In an earlier work, I described how the growing polarization of the confirmation process in recent years was a symptom of the steady degradation of U.S. Senate norms whose decline began in the early 1960s.<sup>104</sup> In this section, I will make the suggestion that the blue slip process is the sanction that a president faces for violating the norm of senatorial courtesy.

Looking at the confirmation process as a game requiring the continued cooperation of both the president and the Senate, it becomes clear that the game<sup>105</sup> has certain norms — certain expectations of “behavioral regularities” — and that sanctions are imposed for deviations from those norms. The blue slip process can be seen as a type of sanction that has evolved to police observance of the confirmation process norms.

One of the most important norms enforced by the Senate is that the president feel obligated to seek senators’ advice when the position is located within their state; or, more recently, when the potential nominee is from their state. This is one aspect of “senatorial courtesy” — and one with deep historical roots. When President Washington failed to seek the advice from the Georgia senate delegation regarding a nomination for a federal position in Savannah, Washington was forced to withdraw the nomination in favor of the person recommended by the senators.<sup>106</sup>

While Article II’s failure to provide any formal advice-giving process has led some to the erroneous conclusion that “advice and consent” was merely a term of art and not to be understood literally, or that the “advice” component has fallen into desuetude, the persistence of the courtesy norm and the evolution of the blue slip suggest the opposite. One could see the Georgia senators’ move against Washington’s nominee as a reaction to a violation of the expectation, created by the language of Article II itself, that the president would consult the senators prior to making formal nominations. As Harold Chase has observed, other senators were willing to support their colleagues in their opposition to the president’s choice because it was “easy for senators to see that if they joined together against the president to protect their individual interests in appointments, they could to a large

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<sup>102</sup> *Id.* at 1688 n.3.

<sup>103</sup> *Id.* at 1688.

<sup>104</sup> See Denning, *Reforming the New Confirmation Process*, *supra* note 1, at 10-29.

<sup>105</sup> Studies of social norms use as a model a game between two or more persons who, lacking information about the intentions of the other, and lacking an efficient legal enforcement mechanism, have to make decisions about whether or not to cooperate to achieve some common goal. In order to build up trust, parties signal to one another that they are of the “good” type that can be trusted. See, e.g., POSNER, *supra* note 97, at 13-27.

<sup>106</sup> The incident is described in CHASE, *supra* note 3, at 10, and Slotnick, *supra* note 6, at 62-63.

degree assure that the president could only make such appointments as would be palatable to them as individuals."<sup>107</sup>

Both the decision to oppose Washington's appointment and the other senators' decision to support their colleagues in standing against the president were signals. To the president, the senators signaled an intention to regard pre-nomination consultation as a norm of the confirmation process. The other senators signaled to their Georgia colleagues that they could be counted on to support them in their decision, and, consequently, that *they* would be worthy of similar support in the future. The president, on the other hand, by withdrawing the nomination, clearly signaled to the whole Senate that he recognized the validity of the advice norm, and would abide by it.<sup>108</sup>

### B. *The Evolution of the Advice Norm as an Aspect of Senatorial Courtesy*

Though early presidents resisted<sup>109</sup> an expectation eventually emerged that presidents would, in fact, consider names for certain governmental posts from the senators and representatives in whose states or districts those persons would serve. Though it necessarily involved surrendering some of the executive power to nominate, this norm was essential because of (i) the increase in the number of federal offices by the mid-nineteenth century; and (ii) the inability of the president to evaluate candidates for those positions.<sup>110</sup> By the twentieth century, as one commentator noted:

[T]he custom of Congressional "advice" was thoroughly systematized by the Republicans. Not only were the Senators officially recognized as the "referees" in the case of state-wide positions; but if there were two administration Senators, and especially if they were not harmonious, they made formal agreements dividing the patronage [in the state].<sup>111</sup>

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<sup>107</sup> CHASE, *supra* note 3, at 7.

<sup>108</sup> As Chase noted, the effort to establish an advice norm may well have failed had Washington, with his unparalleled reputation and prestige, opposed the Georgia delegation. See CHASE, *supra* note 3, at 10. Eric Posner notes that some high-status people can violate norms with impunity because it is too costly to others to refuse to cooperate with him or her. See POSNER, *supra* note 97, at 27-29.

<sup>109</sup> See Fowler, *supra* note 6, at 25-39; Harris, *supra* note 3, at 38-39.

<sup>110</sup> See Fowler, *supra* note 6, at 44 ("[W]ithout Congressional action and appropriations it was difficult to establish a means other than the advice of Congressmen of obtaining reliable information as to applicants for the local offices."); see also *id.* at 57.

<sup>111</sup> *Id.* at 49.

Despite the efforts of nineteenth century reformers and “strong” twentieth century presidents<sup>112</sup> (like the two Roosevelts and Woodrow Wilson) this norm was considered firmly established by the mid-twentieth century.<sup>113</sup> The norm was not, however, *static*. For example, prior to the 1950s, the custom was described by political scientist Joseph Harris as operating in the following manner, which is worth quoting in full:

Under the custom any member of the Senate may block the confirmation of a nomination by stating that the nominee is “personally obnoxious” or offensive to him. In the past it has not been necessary for the senator to do more than merely indicate his opposition to a nomination, and repeat the customary formula. An objection to a nomination does not mean that the nominee is actually “personally obnoxious” to the objecting senator; it frequently involves no animus whatever, but merely indicates that the senator has another candidate. Formerly it was not necessary or expected that the objecting senator give any reasons to support his objection . . . . Usually he advised the chairman of the committee to which the nomination had been referred, and the nomination was not reported to the Senate.<sup>114</sup>

Harris noted, however, that “in recent years the objecting senator has been expected to state his reasons so that the Senate can judge whether they are sufficient.”<sup>115</sup> In several cases he described, senators gave, as the reason for opposition, the fact that the president had ignored (or at least not actively sought) senators’ advice on his nominees.<sup>116</sup>

In one particular case, Georgia Senator Richard Russell, in asking the Senate to oppose a judicial nomination made by President Truman for which Russell preferred another candidate, stated that senators “have a right to believe that if the man they recommend is qualified the recommendation will be followed.”<sup>117</sup> Otherwise, Russell warned, “the constitutional power of the Senate to advise and consent to a nomination means nothing; it has no significance.”<sup>118</sup> The president’s nomination, he continued, was “contrary to custom, and in defiance of the

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<sup>112</sup> *See id.* at 53-56.

<sup>113</sup> *See Harris, supra* note 3, at 36-38 (describing the conflict between Illinois Senator Paul Douglas and President Harry Truman over two federal district court judgeships, in which Douglas “appealed to the courtesy of the Senate in opposing” the president’s nominees). *Id.* at 36. The Senate obliged.

<sup>114</sup> *Id.* at 39.

<sup>115</sup> *Id.* at 40.

<sup>116</sup> *See id.* at 41-42, 43.

<sup>117</sup> *Id.* at 43 (quoting Russell) (internal quotation marks omitted).

<sup>118</sup> *Id.* (quoting Russell) (internal quotation marks omitted).

constitutional powers of the Senate.”<sup>119</sup> The Senate responded to Russell’s entreaties by defeating Truman’s nominee: “[n]o defense was made of the nomination, and it was rejected without roll call.”<sup>120</sup>

The Senate’s support of Senator Russell and others came after a short period of time during which stating personal opposition was not sufficient to block a confirmation — reasons needed to accompany the charge of “obnoxiousness” so that the Senate could evaluate them.<sup>121</sup>

### C. *Contrasting the Courtesy Norm and the Blue Slip*

Thus, the advice norm clearly preceded the blue slip,<sup>122</sup> and was enforced through the support of colleagues on which objecting senators might count as an aspect of the Senate’s courtesy. It is interesting, however, to note a few differences between the courtesy norm and the blue slip. In his classic article on the norm, Joseph Harris noted that the contests usually arose “between the President and members of the Senate . . . when the President declines to nominate the candidate proposed by a senator of his party, ordinarily on the ground that the . . . nominee is not qualified.”<sup>123</sup> A more common objection at the time Harris was writing (1952) was the so-called “personal” objection “entered when the objecting senator concedes that a nominee is fully qualified” but whom the senator nevertheless opposes, often because “the nominee is a political opponent of the [objecting] senator . . . .”<sup>124</sup> The point is that *ideological* opposition did not play a large role, or at least workaday “political” concerns were more often the root source of controversies. This is not surprising considering the second point that Harris

<sup>119</sup> *Id.* (quoting Russell) (internal quotation marks omitted).

<sup>120</sup> *Id.* On the same day, the Senate also rejected another district court nominee from Iowa to whom its senator objected because the president again ignored his recommendation as to who should fill the position. *Id.*

<sup>121</sup> *Id.* at 62 (“For a period it appeared that the Senate would limit the use of the rule by requiring objecting senators to state their reasons, and sustain the objections only if they were found sufficient, but in the last several years the trend has been in the opposite direction.”).

<sup>122</sup> One interesting question is the part that Richard Russell played in devising the blue slip procedure. Recall Griffin Bell’s testimony that the procedure arose because of Senator Russell’s fight with Truman over a district court judgeship. *See supra* note 14 and accompanying text. The controversy of which Judge Bell spoke is very likely the one Harris wrote about in his article, which occurred in 1950. *See supra* notes 114-121. The staff memorandum on the blue slip prepared for Senator Kennedy in 1979 mentioned that the blue slip procedure had existed for about twenty-five years. *See supra* note 9 and accompanying text. That would mean that it had come into existence sometime in the early 1950s — right about the time of the appointment flap with Russell.

<sup>123</sup> Harris, *supra* note 3, at 37.

<sup>124</sup> *Id.* at 44.

makes: that the advice norm was strongest when the president and the objecting senator were of the same political party.

Though senators of the minority party, wrote Harris, “may enter a personal objection to a nominee,” and some had been sustained, the custom was that any objection should be based on purely personal grounds. As he admitted, however, “in practice it is frequently difficult to distinguish between personal and political objections.”<sup>125</sup> (Note that “political” as Harris used the term means that the nominee is a political rival of the senator, not necessarily that there is an ideological objection.) As we have seen, though, the blue slip is available to *all* members of the Senate.<sup>126</sup> Moreover, senators are extremely sensitive about diluting the power of the mechanism by requiring opposition from *both* senators.

Another interesting feature of the courtesy norm *circa* 1950 is that senators were somewhat limited in the *offices* to which they could object. For example, when Senator Theodore Bilbo of Mississippi objected to a circuit court of appeals nominee, he was forced to lodge a personal objection to the nominee because “the judicial circuit included five or six states, [and] a senator from any one of the states could not claim the right to name the person to be appointed to the vacancy . . . .”<sup>127</sup> Harris also commented that objections “against nominees to national offices by a senator from the state of residence of the nominee” is “uncommon;” “courtesy is ordinarily invoked only against appointments to offices located within the state of the objecting senator.”<sup>128</sup> Not so for the blue slip, which is available for all judicial nominations — except those to the United States Supreme Court.

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<sup>125</sup> *Id.* at 45-46.

<sup>126</sup> Harris, who was a critic of senatorial courtesy, ridiculed the notion that the President had a constitutional obligation to consult with the Senate prior to making nominations (as often repeated by many senators). This would mean, Harris wrote (offering what he no doubt thought was the perfect *reductio ad absurdum*), that “the President would be required to consult with senators of the opposite party as well as those of his own party — something which no one has ever contended.” *Id.* at 60. This, too, has become part of the expectation with judicial nominations. For example, rankled by what they considered to be insufficient consultation by the White House regarding a Hawaii attorney nominated to the Ninth Circuit Court of Appeals, Senators Inouye and Akaka withheld their blue slips, claiming that they wanted more information on the nominee. See Susan Roth, *Hawaii's Senators Still Rankled By White House Treatment on Judge Nominee*, GANNETT NEWS SERV., July 24, 2001, available at 2001 WL 5111968. The senators complained that the White House “merely notified the senators of the president’s choice, [and] never asked their opinion.” In another case, North Carolina Senator John Edwards is reportedly withholding a blue slip on a Bush nominee to the Fourth Circuit Court of Appeals until he receives assurance that there will be “balance” on the circuit court — meaning that he would have significant input in selecting a moderate candidate to balance the Bush choice, who is said to be quite conservative. See Kevin Begos, *Edwards Exerts Hold on Boyle Judgeship*, WINSTON-SALEM J. (N.C.), July 7, 2001, at 1.

<sup>127</sup> Harris, *supra* note 3, at 48.

<sup>128</sup> *Id.* at 50.

#### D. Summary

The blue slip is the formal sanction for violation of the Senate norm of the courtesy from presidents, who are expected to seek advice from Senators prior to making judicial appointments. Prior to the mid-1950s, the sanction was largely available only to senators of the president's own party who either objected to a president's consideration of a nominee to an office inside that senator's state who was (i) a political rival for a position in that senator's state; or (ii) who simply was not the senator's preferred candidate. Moreover, an objecting senator had to make his objection publicly, and was sometimes even required to state his objections with some specificity, which his colleagues would then weigh.

Under the blue slip regime, on the other hand, senators of either party are entitled to indicate their disapproval of a judicial nominee from their state by withholding a slip of paper distributed to them by the Judiciary Committee. According to Senate custom, if even one senator from a state withholds the slip, the nomination will not go forward. While formerly used primarily to delay candidates, the blue slip has been used with increasing frequency to defeat nominees. Until a new agreement was reached between Republicans and Democrats on the Judiciary Committee in the summer of 2001, the identity of the senator withholding the blue slip was secret.

Like the arguments employed on behalf of the courtesy norms of which Joseph Harris wrote, many senators defend the blue slip process as necessary to encourage the executive branch to respect what senators see as a constitutional obligation to seek advice from senators prior to making certain judicial nominations. For its part, members of the executive branch have, in candid moments, admitted that without the blue slip, presidents would have little incentive to vet nominees with home state senators. Despite its lack of explicit sanction in the Constitution, the mechanism is an outgrowth of norms that are not only suggested by the Constitution (*i.e.*, the Senate is supposed to render "*advice* and consent," not just "consent"), but also that have existed since the Washington Administration.

#### V. CAN WE PINK SLIP THE BLUE SLIP?: POSSIBILITIES FOR REFORM

As Judge Richard Posner correctly observes, "Norms, like laws, can be bad . . ."<sup>129</sup> Even if they happen to be "efficient within the group in which they are felt as binding, they may be dysfunctional for society as a whole . . ."<sup>130</sup> Thus, what norms are operative in the confirmation process and what norms are good ones are separate questions. Despite the difficulty one has pronouncing the process *unconstitutional*, the blue slip is clearly at odds with the advertised benefits of

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<sup>129</sup> POSNER, *supra* note 99, at 289.

<sup>130</sup> *Id.* at 293.



dividing responsibility for nomination and confirmation between the president and the Senate.<sup>131</sup> Moreover, recent evidence suggests that, like the hold, changes in the Senate itself have allowed the blue slip to evolve into an offensive, not a defensive, weapon; and that internal norms that once checked abuses have degraded.<sup>132</sup>

The question then arises, "Can the norm be altered?" Could the blue slip process be scrapped? Or at least replaced with something else? The answer is yes, but the alteration or destruction of norms, or a norm-enforcement mechanism — particularly one with deep historic roots — can be quite difficult.<sup>133</sup> Professor Gerhardt has argued that uncertainty surrounding the scope of a norm ("norm ambiguity")<sup>134</sup> and the willingness of political actors actively to seek the creation of new norms ("norm entrepreneurship")<sup>135</sup> may "create . . . context[s] in which the development of a new norm is possible."<sup>136</sup> The early Georgia senators, for example acted as norm entrepreneurs by creating the advice norm that resulted in Washington's withdrawal of his nominees for the post in Savannah. Similarly, President Carter's norm entrepreneurship, demonstrated by the creation of nominating committees to fill judicial vacancies, temporarily resulted in a period of norm ambiguity, which Senator Kennedy then tried to exploit by modifying the existing blue slip procedure. And, before the Jeffords defection, Senate Republicans attempted to engage in norm entrepreneurship by requiring both senators to withhold blue slips to scuttle a nomination, after years of permitting only one senator to halt a nominee.<sup>137</sup>

Keeping in mind the difficulties that inhere in changing a norm or creating a new norm, there are some indications that reform may be possible now that power in the Senate has changed hands. I argue below that recent controversies may have unsettled the advice norm that gave rise to the blue slip enough that it could not withstand an assault by an entrepreneur committed to changing the norm.

First, the Senate itself will soon experience significant personnel changes; specifically, the retirement of Strom Thurmond and Jesse Helms. Senator Thurmond was a vociferous supporter of the blue slip; Senator Helms often took

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<sup>131</sup> See *supra* notes 81-96 and accompanying text.

<sup>132</sup> For more on these changes in the Senate itself, see Denning, *Reforming the New Confirmation Process*, *supra* note 1, at 14-25.

<sup>133</sup> POSNER, *supra* note 97, at 300 ("Creating a norm requires promulgation of the norm and the creation of sanctions for its violation. Eliminating a norm requires promulgation, too, and also the destruction of the expectations and tastes that support the sanctions for its violation — a process . . . that may be as costly as their creation in the first place. *Changing a norm, which requires elements of both destruction and creation, can be the most difficult trick of all.*")

<sup>134</sup> Gerhardt, *supra* note 101, at 1696.

<sup>135</sup> *Id.* at 1710-14.

<sup>136</sup> *Id.* at 1696.

<sup>137</sup> See *id.* at 1713-14.

advantage of the procedure to stop unwanted judicial nominations from seeing the light of day. Recall that Elliott Slotnick, in his survey of senators' attitudes towards the blue slip, found that seniority and majority/minority status were often significant factors in a senator's favoring the retention of the procedure.<sup>138</sup> The older a senator was, the more likely he was to support the blue slip; support among minority senators for the procedure was nearly unanimous. Now, however, some of the blue slip's most ardent proponents have retired, or will retire soon. Unless other, younger senators approach the issue with the passion of the older senators, the departure of the older members alone may spur change.<sup>139</sup>

Further contributing to the possible destabilization of the norm and its enforcement mechanism may be the unfavorable press coverage the blue slip has recently received. Reaction to the blue slip by national and regional commentators was universally negative.<sup>140</sup> The idea that a single senator could, because of mere partisan pique, disqualify an otherwise qualified nominee from a judicial position without so much as a good reason strikes most as absurdly unfair. The public reaction following revelations of other individual abuses of power in the Senate, like the filibuster or the hold, was similar.<sup>141</sup>

The return of the Democrats to power in the Senate may also affect the future of the blue slip. After years of complaining that scores of Clinton judges were held hostage to members' whims, Democrats will be under pressure not to pay Republicans back, lest they look like rank hypocrites. But what on the surface appears to be a frustrating restraint on a power that Republicans wielded lustily against Democratic judicial nominees may actually be a golden opportunity for Democrats to serve as norm entrepreneurs in changing the blue slip process.

Because of public pressure not to appear to be giving as good as they got at the hands of Republicans, Democrats may be inhibited in the full exercise of their blue slip power. If they cannot do so, then perhaps they are in the best position to effect reform. Reforming the blue slip process would enable Democrats to (i) respond to negative public opinion about the blue slip procedure, thus allowing them to claim the progressive, reformist mantel and mark opponents as hidebound protectors of undemocratic privilege; and (ii) possibly ease the way for the judicial nominations of a future Democratic president, even if reform inured to the immediate benefit of President Bush and his nominees. Democrats could always muster support to defeat a truly unacceptable nomination, but having Bush's nominees reap the short-term benefits means that Republicans in the Senate may be more likely to go along.

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<sup>138</sup> Slotnick, *supra* note 6, at 73; *see also supra* text accompanying note 55.

<sup>139</sup> With the older members may also go the old Senate folkways like institutional patriotism and courtesy.

<sup>140</sup> *See supra* note 76.

<sup>141</sup> *See Denning, Reforming the New Confirmation Process, supra* note 1, at 32-33.

Assuming that the possibility of reforming the blue slip process exists, what types of reforms should be attempted? One possibility is that the Senate could “end it, not mend it;” but given senators’ perceptions that they have a constitutional role to play in the giving of advice (which has been reinforced through the years), total abandonment is unlikely. If it is to exist, what reforms might be undertaken to make it more consistent with the Constitution’s division of power between the president and the Senate — a division that was expected to ensure accountability and transparency in the process?

One reform that would help restore both would be to memorialize the custom in a Senate, or at least a Judiciary Committee rule. The slip itself suggests that some rule did exist, at one time.<sup>142</sup> At a minimum, such a rule should specify that the withholding of a blue slip will be made public by the chair of the Judiciary Committee, even if the chair is the one doing the withholding. Second, senators should be required to communicate their objections to the chairman or to the White House. Further, consistent with past practice, the withholding of a blue slip should be a signal that the administration needs to confer with a senator, and not an automatic death sentence for the nominee, especially if the senator is in the minority. Therefore, some time limit on how long a blue slip could be withheld should be considered. After a reasonable period of time to resolve differences with the White House, a senator should be required to make her case to her colleagues indicating her objections to the nominee, ask for their support, and have the Senate decide, as a body, whether or not it wishes to go along.<sup>143</sup>

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<sup>142</sup> See *supra* note 12 and accompanying text. There may be some objections raised to reducing the blue slip custom to writing; these are worth mentioning. First, any such rule would, by its nature, be public. Publicity invites scrutiny, and the Senate may face *more* criticism if the procedure is spelled out in its rules, or in one of its committee’s rules. (This objection has been blunted somewhat by the agreement to make public who is withholding blue slips.) Second, while a rule would be helpful to eliminate the uncertainty and ambiguity surrounding the practice — over whether one or two blue slips must be withheld to kill a nomination, for example — that ambiguity may be useful to senators who can use it to their advantage when they are in power. Third, reducing the custom to a rule would imply a reaffirmation of the blue slip procedure by fixing it in the Senate rules. Given the criticism of the process, senators may prefer to leave it unwritten and thus make use of a preexisting custom without having to endorse it publicly. Fourth, committing the Senate to this one sanction might stifle the evolution of other means to ensure consultation by the executive branch. Finally, senators might hesitate to write a rule for this custom, lest there be pressure to codify other practices, like the “hold,” or modify jealously-guarded prerogatives like the filibuster.

<sup>143</sup> Such reforms might also be coupled with other needed procedural reforms in the Senate, such as the number of votes needed to invoke cloture, so that a disappointed senator could not bring the work of the Senate to a standstill. For a discussion of how these reforms might be accomplished, see Denning, *Reforming the New Confirmation Process*, *supra* note 1, at 31-41.

Of course, it is just as likely that nothing will happen, just as nothing really happened in 1979, despite Senator Kennedy's attempts at reform. Even if the Senate is not inclined to undertake a reform on the order of what I suggested above, it still may be encouraged to exercise its power judiciously. One way to do so would be for the White House to make the confirmation of its judicial nominees a priority;<sup>144</sup> and, while respecting the expected confirmation norms, be willing to publicly criticize senators (of either party) who abuse the blue slip. Given the unfavorable press coverage the procedure has received, senators forced to explain on television that they are holding up the president's nominees because of tradition might think twice before making habitual use of the blue slip.

### CONCLUSION

The blue slip process has evolved as an effective mechanism for the enforcement of the norm that presidents are to seek the advice of senators before making judicial nominations. The advice norm emerged early in our history and represents one aspect of "senatorial courtesy." In recent years, however, the degradation of norms that held abuses of Senate power in check has rendered the blue slip susceptible to abuse, the effects of which were realized first during the Clinton Administration and have already affected President Bush's judicial nominations. I have argued here that the evolution of both the norm and of a mechanism for its enforcement is understandable if the Senate's advice role was not to become an ineffective adjunct to its consent role. Nevertheless, its operation has undermined the twin virtues of accountability and transparency that were seen as the strengths of the Constitution's arrangement for confirming nominees to government office. Since circumstances now exist that make thoughts of reform possible, I suggest that the Senate commit the practice to a rule, either at the Committee level or the Senate level; or, in the alternative, that the executive branch take a more active role in identifying and publicizing what it perceives to be abuses of the procedure during the confirmation process.

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<sup>144</sup> Professor Gerhardt suggests that by not making judicial nominations a high priority, and not standing by its nominees, the Clinton Administration essentially courted controversy. See GERHARDT, *supra* note 3, at 123-24.