

The one obstacle to an originalism-driven judiciary

By **Hugh Hewitt** April 11 at 8:17 AM

“First 100 days” narratives are great for ratings and clicks, but not much use for historians. So long as we’re indulging that narrative, though, President Trump’s signature achievement of his first 100 days is the appointment of Neil Gorsuch to the Supreme Court. The new justice will be a fixture of originalist majorities on the court, one hopes, for decades to come. That Harry Reid’s demolition of the Senate filibuster for nearly all nominations was completed by Senate Majority Leader Mitch McConnell (R-Ky.) is not the president’s achievement, but it was Trump’s choice of a nominee as stellar as Gorsuch that made the result of applying the “Reid Rule” inevitable. During his hearings, Gorsuch displayed perfect judicial temperament combined with extraordinary intellectual capacity. His performance laid out a blueprint for obtaining the simple majorities needed for future Trump nominees for justices and judges, on the highest court and the crucial circuit courts and district courts as well.

There are now 19 vacancies on the federal appeals courts, and only one nominee, the certain-to-be-confirmed Judge Amul Thapar, nominated to the 6th Circuit. More five-star nominees are said to be in the works, and hopefully soon: There are a hundred-plus district court and special court vacancies that also need filling. Assuming that future nominees have Gorsuch-like credentials, then only one obstacle stands in the way of a return to an originalism-driven federal bench. But that obstacle is enormous in the lore of the Senate: the so-called “blue slip.”

The blue slip is simply the piece of paper that is sent to the senators from the home state of every judicial nominee. If a senator has no objection to the nominee, the blue slip (so named for the color of the paper) is sent back to the Judiciary Committee chairman with an indication of approval. If the senator objects, the paper is either sent back indicating disapproval or not returned at all. First used in 1917, there are various “practices” surrounding these slips. Some committee chairs of the past have refused to move a nominee forward without such a slip. Others have attached some significance to the slip, but not dispositive weight.

But the best practice would be for blue slips not to exist at all.

The blue slip isn’t a law, and it would be anathema to the framers. It’s a leftover of decades past, a means by which individual senators could control their region’s judicial future. The non-return of a blue slip should receive no weight, or at most a trigger of a few weeks’ delay so as for the “concerned” senator to assemble a package of his or her reasons for the Judiciary Committee to review. There is no reason in the Constitution or common sense that voters from Michigan, which went for Trump, closely

divided Virginia or even deep-blue New York should be denied judges because they have two senators that don't like Trump's nominees. Blue slips are simply and obviously deeply anti-democratic.

The blue slip is partly why the U.S. Court of Appeals for the 9th Circuit is such a mess. Now-retired Sen. Barbara Boxer, who was on the far left edge of the far left of the Democratic Party, held heavy influence or even a veto over 9th Circuit nominees from the Golden State. The circuit has jurisdiction over some 60 million Americans, ranging in views from deep-blue California to deep-red Idaho, yet many of the nominees to its bench often needed Boxer's imprimatur to proceed to a vote of the Judiciary Committee, let alone a vote of the full Senate. That's nonsense.

The U.S. Senate is a wonderful institution. Over the centuries, however, it has developed some deeply anti-democratic and anti-republican practices, chief among them this "rule of one" when it comes to judicial nominations. It will be up to Senate Judiciary Committee Chairman Charles E. Grassley (R-Iowa) to seal his place in Senate history as a deeply committed constitutionalist by ending the Senate's "tradition" of the blue slip. If Grassley rids the Senate of the practice forever, his place in the chamber's history will be secured as a leader who sought to rebalance the institution's practices in alignment with the framer's intentions. It's true that the framers explicitly carved out the Senate's special role in the confirmation of presidential nominations. But they never intended one person — not even the president, who is elected by the entire country — to wholly control the fate of a judicial nomination, which is what the blue-slip practice has often become.

Saving the federal bench from "living Constitution" enthusiasts likely will be Trump's big mark on American history. To be independent and vigorous, to be populated by the best and the brightest, the federal judiciary needs to be free of this hoary practice. The blue slips have to be burned. Americans would applaud such a manifestly fair and common-sense reform of a practice gone mad, and the framers would cheer from above.

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