

## COMMENT

### POLITICAL AND PRACTICAL EFFECTS OF THE UNWRITTEN RULES OF THE SENATE ON THE JUDICIAL APPOINTMENTS PROCESS

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#### INTRODUCTION

“Each House may determine the rules of its proceedings . . . .”<sup>1</sup> The Constitution so introduces the prerogative of the House and Senate to govern their own conduct—but it lays out no guidelines for how the chambers should construct these rules.<sup>2</sup> The Senate’s system of self-governance has become so complex that it requires a full-time parliamentarian to prepare written guidance for Senators and convey advice to the presiding officer on the appropriate rulings in session.<sup>3</sup> In spite of (or perhaps because of) this complexity, many of the Senate’s rules are not codified, and the most recent compilation of the Senate’s informal precedent was published in 1992, with only smaller collections published electronically since.<sup>4</sup> The question, then, is whether the proliferation of unwritten rules and precedents has an effect on the ability of the Senate to exercise its lawmaking authority.

Former Senate Parliamentarian Floyd Riddick described the chamber’s procedure as “a maze that nobody can run through unless you study.”<sup>5</sup>

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<sup>1</sup> U.S. CONST. art. I, § 5.2.

<sup>2</sup> The primary limitations on Congress’s self-governance are that the rules of the chambers must not “ignore constitutional restraints or violate fundamental rights” and that “there should be a reasonable relation between the mode or method of proceeding . . . and the result which is sought to be attained.” *United States v. Ballin*, 144 U.S. 1, 5 (1892).

<sup>3</sup> VALERIE HEITSHUSEN, CONG. RSCH. SERV., RS20544, *THE OFFICE OF THE PARLIAMENTARIAN IN THE HOUSE AND SENATE* 1 (2018).

<sup>4</sup> *Id.*

<sup>5</sup> Interview by Donald A. Ritchie with Floyd M. Riddick, Senate Parliamentarian (July 12, 1978).

Decidedly, Senate procedure is intricate, and the day-to-day function is governed by a mix of Standing Rules, statutory rules, constitutional requirements, standing orders, and informal precedent.<sup>6</sup> Among these, the precedents take the largest role. Senators generally adhere to the unwritten rules, but because they are not binding, they can be bent and broken.<sup>7</sup> This “procedural looseness” is one of the reasons that the Senate’s actions are “especially vulnerable” to obstruction.<sup>8</sup>

The Senate’s constitutional abilities and duties are expansive, but those relating to the confirmation process are not clearly defined.<sup>9</sup> The chamber’s responsibilities relating to judicial confirmations are sparsely described as “Advice and Consent,”<sup>10</sup> and the form of that process has changed significantly over the years.<sup>11</sup> To accommodate for the dearth of formal requirements, the Senate and the Executive “developed informal accommodations or arrangements . . . with respect to judicial appointments.”<sup>12</sup> The outcome of the judicial nomination process thus depends in no small part upon the exercise of these unwritten rules.<sup>13</sup>

Unwritten rules aren’t unique to Congress, and cannot uniformly be described as useful or harmful. Baseball, for instance, is famed for its unwritten rules. Some of them are substantive, and dictate good strategy (for instance, runners are expected not to make the first out of an inning at third base).<sup>14</sup> Others are matters of courtesy or deference and shouldn’t affect the outcome of a game at all (such as the idea that players shouldn’t drive up the score when ahead by a substantial margin).<sup>15</sup> Some are matters of pure

<sup>6</sup> James Wallner, *A Beginner’s Guide to the Senate’s Rules* 1, R Street Policy (Sept. 2017).

<sup>7</sup> Keith Krehbiel, *Unanimous Consent Agreements: Going Along in the Senate*, 48 J. POL. 541, 542 (1986).

<sup>8</sup> John C. Roberts, *Gridlock and Senate Rules*, 88 NOTRE DAME L. REV. 2189, 2191 (2013).

<sup>9</sup> Nat’l Const. Ctr. Staff, *The Constitution and the Cabinet Nomination Process*, NAT’L CONST. CTR. (Feb. 2, 2017), <https://constitutioncenter.org/blog/the-constitution-and-the-cabinet-nomination-process> [<https://perma.cc/K89C-5YLL>].

<sup>10</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>11</sup> See Russell L. Weaver, “Advice and Consent” in *Historical Perspective*, 64 DUKE L.J. 1717, 1730–38 (2015) (summarizing the evolution of the Advice and Consent process).

<sup>12</sup> Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 669 (2003).

<sup>13</sup> *Id.* at 670.

<sup>14</sup> Anthony Castrovince, *A Look at Baseball’s ‘Unwritten Rule Book’*, MLB (Aug. 18, 2020), <https://www.mlb.com/news/the-unwritten-rules-of-baseball> [<https://perma.cc/9LJZ-6JKJ>].

<sup>15</sup> *Id.* (outlining the unwritten rules of baseball); see George F. Will, *In Baseball, the Most Valuable Rules Are Unwritten*, SALT LAKE TRIB. (Oct. 30, 2019, 3:17 PM), <https://www.sltrib.com/opinion/commentary/2019/10/30/george-f-will-baseball/> [<https://perma.cc/D855-9QMR>] (arguing for the importance of baseball’s rules of courtesy).

tradition or superstition (as with the admonition that no one—spectator, player, or announcer alike—should speak of a perfect game while it is in progress).<sup>16</sup> These same categories apply to the Senate’s unwritten rules as well.

Just as in baseball, some of the Senate’s unwritten rules have no effect on the substance of lawmaking. For many years, Senate tradition dictated that women should not wear pants on the chamber floor.<sup>17</sup> This unwritten rule was plainly unrelated to legislation—and sexist to boot—but it lasted until the Clinton presidency.<sup>18</sup> Other unwritten rules and traditions are equally tangential to the actual business of the Senate, but have persisted for decades—the requirement that the Senate cafeteria shall always serve bean soup,<sup>19</sup> for instance, or the senators’ springtime tradition of Seersucker Thursdays.<sup>20</sup> These longstanding requirements and rituals are simply part of the Senate atmosphere, and have evolved out of years of practice.

Not all of the Senate’s unwritten rules are so tangential, nor so easy to define. One unwritten rule that has recently gone by the wayside was the tradition that newly elected senators should not speak for weeks—or months, or even years—after their installment, out of deference to senior members and respect for the “apprenticeship” that freshmen were expected to serve.<sup>21</sup>

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<sup>16</sup> See, e.g., Dan Tylicki, *Baseball’s 25 Biggest Unwritten Rules*, BLEACHER REP. (Apr. 17, 2012), <https://bleacherreport.com/articles/1146901-baseballs-25-biggest-unwritten-rules> [<https://perma.cc/FE9G-N5CH>] (“When a pitcher is five-plus innings into a no-hitter or perfect game, then it’s common courtesy not to mention it. If you do, it’ll end up jinxing it especially if you’re a teammate.”). A “perfect game” occurs in baseball when a pitcher allows no opposing batters to reach base, retiring every batter in the order that they take the plate. *MLB Miscellany: Rules, Regulations, and Statistics*, MLB.COM, [http://mlb.mlb.com/mlb/official\\_info/about\\_mlb/rules\\_regulations.jsp](http://mlb.mlb.com/mlb/official_info/about_mlb/rules_regulations.jsp) [<https://perma.cc/SG6C-D2H3>] (last visited Apr. 21, 2021).

<sup>17</sup> See Trisha Leigh Zeigenhorn, *The Woman Who Finally Wore Pants onto the Senate Floor – in 1993, DID YOU KNOW?*, <https://didiyouknowfacts.com/the-woman-who-finally-wore-pants-onto-the-senate-floor-in-1993/> [<https://perma.cc/2Z8X-A9Y2>] (last visited Oct. 9, 2021) (discussing the unwritten rule that women in the Senate could not wear pants).

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

<sup>19</sup> Richard A. Baker, TRADITIONS OF THE UNITED STATES SENATE, 6.

<sup>20</sup> *Id.* at 13.

<sup>21</sup> See Donald R. Matthews, *The Folkways of the United States Senate: Conformity to Group Norms and Legislative Effectiveness*, 53 AM. POL. SCI. REV. 1064, 1065 (1959) (“[N]ew members are expected to serve an unobtrusive apprenticeship.”); Baker, *supra* note 19, at 9 (“From the Senate’s earliest days, new members have observed a ritual of remaining silent during floor debates for a period of time—depending on the era and the senator. That period once ranged from several months to several years.”).

This policy was observed for “most of the Senate’s existence” but has been largely abandoned since the advent of the 24-hour news cycle because “the electorate wouldn’t stand for it.”<sup>22</sup> Other unwritten rules include the Senate precedents governing recognition in the chamber and the amendment process, and the tradition of “trading votes” to pass legislation.<sup>23</sup>

Two of the most prominent sets of unwritten rules in the Senate relate to the confirmation processes for federal officers and the judiciary—thus implicating two or even three branches of government rather than just one. The first of these is the unwritten rule of Senatorial Courtesy, under which the Senate defers to a senator who objects to a nominee for federal office in her home state.<sup>24</sup> The related practice of sending out “blue slips” in the Judiciary Committee to gauge home-state senators’ support is also not subject to a formal rule.<sup>25</sup> The second unwritten rule affecting multiple branches is a practice—often called the Thurmond Rule—under which nominees for federal courts may or may not be considered after an indeterminate point in the Presidential election cycle.<sup>26</sup> The effect of these rules is significant, as they pertain not only to the Senate’s constitutional duties, but to the Executive and the Judiciary’s duties as well.<sup>27</sup>

In Part I, I summarize the historical practices of senatorial courtesy, blue-slipping, and the so-called Thurmond Rule. In Part II, I examine the effects of adherence to, and departure from, these unwritten rules. In particular, the examination focuses on the political consequences faced by senators and

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<sup>22</sup> Baker, *supra* note 19, at 9. The once-ubiquitous practice of quiet “apprenticeship” has more recently been observed to varying degrees by individual senators, with some freshmen becoming high-profile and vocal while others “mov[e] into hunker-down mode” after being sworn in. Carl Hulse, *New Senators’ Goals May Be Shaped by Their Styles*, N.Y. TIMES (Feb. 25, 2011), <https://www.nytimes.com/2011/02/26/us/politics/26senate.html> [https://perma.cc/9YGC-WCD4].

<sup>23</sup> Wallner, *supra* note 6.

<sup>24</sup> Oscar S. Cox, *Senatorial Courtesy*, 1 OP. OFF. LEGAL COUNSEL 88, 88 (2013).

<sup>25</sup> MICHAEL A. SOLLENBERGER, CONG. RSCH. SERV., RS21674, THE BLUE-SLIP PROCESS IN THE SENATE COMMITTEE ON THE JUDICIARY: BACKGROUND, ISSUES, AND OPINIONS 2 (2003).

<sup>26</sup> Carl Tobias, *Transforming the “Thurmond Rule” in 2016*, 66 EMORY L.J. ONLINE 2001, 2001 (2016); see Mary Kay Linge, *McConnell Dismisses “Biden Rule” for SCOTUS Nominee as GOP Controls Senate*, WH, N.Y. POST (Sept. 19, 2020, 6:07 PM), <https://nypost.com/2020/09/19/mitch-mcconnell-dismisses-biden-rule-for-scotus-nominee/> [https://perma.cc/HE26-B2BQ] (referring to the rule as the “Biden Rule” in the context of a Supreme Court nomination).

<sup>27</sup> Because the Executive has the duty of nomination, the role of the President in this process is significant. No less is the effect on the Judiciary, because the composition of that branch is directly affected by the process’s outcome—if the Senate rejects or fails to consider a nominee, that nominee cannot take the bench (setting aside the possibility of recess appointment).

the practical effects of the rules on lawmaking. Part III addresses the question of whether the continued existence of these unwritten rules is desirable, in light of the constitutional duties and practical needs of the Senate. I conclude that the proliferation of unwritten rules creates too many questions and complications to be encouraged. Finally, Part IV summarizes the options available to address these unwritten rules. I explain why judicial intervention is possible but unlikely, and address two different methods of legislative reform—codification and abrogation.

## I. THE HISTORY OF UNWRITTEN RULES

### A. Senatorial Courtesy and the “Blue Slip” Process

One of the oldest of the Senate’s informal rules is senatorial courtesy. Senatorial courtesy is a longstanding tradition that has persisted from the first Congress through to the present day.<sup>28</sup> The tradition is more than the mere nicety its name suggests. It is not a set of rules for politeness observed on the Senate floor, but rather a means by which, through unilateral objection, a Senator may scuttle the nomination of a certain person to federal office.<sup>29</sup> While most often applied to appointments in the objecting senator’s home state, the reach of senatorial courtesy has at times been broader.<sup>30</sup>

The custom can be traced to the 1789 nomination of Benjamin Fishbourn by President Washington for a naval post in Savannah, Georgia, which was opposed on the grounds of “nothing of consequence but personal invective and abuse” by James Gunn, one of Georgia’s senators.<sup>31</sup> However

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<sup>28</sup> See, e.g., Charlene Bickford, *Setting Precedent: The First Senate and President Washington Struggle to Define “Advice and Consent,”* 7 FED. HIST. 1, 6 (2015) (tracing senatorial courtesy to 1789); “Personally Obnoxious?: Senatorial “Courtesy” and Judicial Nominations,” 33 A.B.A. J. 805, 805 (1947) (addressing questions about the application of senatorial courtesy in 1947); Cox, *supra* note 24 (addressing questions about the application of senatorial courtesy in 2013).

<sup>29</sup> Cox, *supra* note 24, at 88.

<sup>30</sup> See Jason Eric Sharp, *Restoring the Constitutional Formula to the Federal Judicial Appointment Process: Taking the Vice out of “Advice and Consent,”* 26 U. ARK. LITTLE ROCK L. REV. 747 (2004) (noting that the role of senatorial courtesy is sometimes considered to extend beyond home-state offices such as the District Courts). As I will address in later sections, the exact contours of senatorial courtesy are not agreed upon.

<sup>31</sup> Bickford, *supra* note 28, at 10. Fishbourn had replaced Ruben Wilkinson in the role, and Wilkinson intended to request reappointment with the support of Sen. Gunn, in whose election Wilkinson had been instrumental. *Id.* at 7. After attempts to “avoid or conceal” an outright objection to

flimsy the grounds, they were sufficient to defeat the nomination, and the incident is cited as the origin of senatorial courtesy.<sup>32</sup> The rejection of Fishbourn set a precedent that remains in effect—that the entire Senate would, on occasion, accede to a single senator’s objection in rejecting a nominee.<sup>33</sup>

Because the rule is unwritten,<sup>34</sup> the exact limits of the power held by senatorial courtesy are not clearly defined.<sup>35</sup> Generally, the rule applies where “a President nominates someone for a federal office within a state, without consulting the senator or senators of the President’s party from that state,” and, if honored, results in rejection of the nominee at a home-state senator’s request.<sup>36</sup> The form of the objection is no more developed now than it was when Senator Gunn objected in 1789—traditionally the home-state senator who wishes to defeat a nomination need only state that the nominee is “personally obnoxious” to her.<sup>37</sup> Senators disagree as to whether further grounds are necessary,<sup>38</sup> but generally concur that the home-state senators’ preferences should be honored with regard to local offices.<sup>39</sup> This is not to say that the objection will *always* be honored, even for such offices, because the informal nature of the rule allows the Senate to proceed over an objection.<sup>40</sup>

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Fishbourn’s nomination, Gunn rose to make an objection on the floor which was described later as “false, [m]alignant, and invidious” and “an illiberal attack upon [Fishbourn’s] [c]haracter.” *Id.* at 7, 11.

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.* at 12.

<sup>34</sup> See Cox, *supra* note 24, at 88 (2013) (“The custom known as ‘senatorial courtesy’ is not a formal rule of the Senate, and is not included in the published rules of that body.”).

<sup>35</sup> Compare *id.* at 91 (noting that “most, if not all” instances where a nominee to the Supreme Court was objected to under senatorial courtesy were rejected “based on considerations independent of the objection so raised”), with Sharp, *supra* note 30, at 756 (“Although primarily a tool for the consideration of nominations of district judges, the practice of senatorial courtesy accounts, at least partially, for the rejection of several nominations to the Supreme Court.”).

<sup>36</sup> RONALD D. ROTUNDA & JOHN E. NOWAK, 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 9.7(b)(iii) (2012).

<sup>37</sup> BETSY PALMER, CONG. RSCH. SERV., RL31948, EVOLUTION OF THE SENATE’S ROLE IN THE NOMINATION AND CONFIRMATION PROCESS: A BRIEF HISTORY 7 (2008).

<sup>38</sup> *Id.*; see also “Personally Obnoxious?": Senatorial “Courtesy” and Judicial Nominations, *supra* note 28, at 806 (debating whether the “personally obnoxious” objection should be honored).

<sup>39</sup> Cox, *supra* note 24, at 88.

<sup>40</sup> See PALMER, *supra* note 37, at 8 (referencing a 1938 case in which a nominee was confirmed over the home-state senator’s objection); ROTUNDA & NOWAK, *supra* note 36, at § 9.7(b)(iii) n.17 (“[O]ther senators have refused to extend the courtesy to a senator who ‘had on numerous

Closely tied to senatorial courtesy is the “blue slip” process, which is limited to judicial nominees. “Blue-slipping” is a Judiciary Committee procedure “along the same lines” as senatorial courtesy.<sup>41</sup> The Judiciary Chair “seeks the assessment of nominees from home-state Senators” by issuing a blue sheet of paper, which may be returned with a positive or negative recommendation, or withheld entirely.<sup>42</sup> The process is subject to alteration in every new Congress, because the Judiciary Chair has “discretion to change the policy when deemed necessary.”<sup>43</sup> The chairperson has total control over the blue slip’s effect, and determines how much weight a senator’s recommendation will be given.<sup>44</sup> As with the broader custom of senatorial courtesy, the blue slip process “is not a formal part of the Judiciary Committee’s rules.”<sup>45</sup> If the chair chooses to adhere to the usual blue slip policy, she will generally table the nomination “rather than allowing the nomination to proceed to a full Senate vote likely to fail.”<sup>46</sup> In essence, the Judiciary Committee’s blue slip process serves to predict whether senatorial courtesy will be exercised, and to kill the nomination at the committee stage if that is the case.

### B. The “Thurmond Rule”

While senatorial courtesy has a long tradition of practice in the Senate, the so-called Thurmond Rule is a far more recent development.<sup>47</sup> The Rule, which is often traced to Strom Thurmond’s leadership in the Judiciary Committee, holds that the Senate should stop its confirmation process for judicial nominations at some point in presidential election years.<sup>48</sup> Of course, the Thurmond Rule is not a “rule” at all, in the colloquial sense; it is

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occasions shown marked discourtesy to his colleagues.” (quoting J. Harris, *THE ADVICE AND CONSENT OF THE SENATE*, 224–25 (1953)).

<sup>41</sup> *supra* note 37, at 4. Essentially, just as with senatorial courtesy, blue-slips can prevent the confirmation of a judicial nominee based on the objection of a single senator.

<sup>42</sup> SOLLENBERGER, *supra* note 25, at 1. Blue-slipping evolved out of senatorial courtesy, and has been referred to as an “institutionalized” form of the practice. *Id.* at 3.

<sup>43</sup> *Id.* at 13.

<sup>44</sup> PALMER, *supra* note 37, at 9.

<sup>45</sup> *Id.*

<sup>46</sup> Sharp, *supra* note 30, at 755.

<sup>47</sup> See Tobias, *supra* note 26, at 2002 (dating the Thurmond Rule to 1980).

<sup>48</sup> Russell Wheeler, *The “Thurmond Rule” and Other Advice and Consent Myths*, BROOKINGS INST. (May 25, 2016), <https://www.brookings.edu/blog/fixgov/2016/05/25/the-thurmond-rule-and-other-advice-and-consent-myths/> [<https://perma.cc/TT8Z-B2T6>].

a “peculiar tradition—not a statute or even a powerful dictate, like Senate rules, which bind members.”<sup>49</sup> While it has been invoked several times since its 1980s origin,<sup>50</sup> there is no consensus on the Rule’s existence,<sup>51</sup> application,<sup>52</sup> or even its name.<sup>53</sup>

The Thurmond Rule is not selective in the way that senatorial courtesy and the blue slip process are. While senatorial courtesy allows individual senators to block individual nominees, the Thurmond Rule allows the Judiciary Chair to block *all* nominees at a time that he or she sees fit during the election year.<sup>54</sup> Some “consensus” nominees may be excepted from the Rule, but generally the Rule is taken to apply to all lifetime appointments.<sup>55</sup>

The Thurmond Rule normally sees use in two scenarios. First, when the majority in the Senate does not control the White House and refuses to advance nominees based on the possibility that its party may win the presidency.<sup>56</sup> Second, when the majority party *does* control the White House

<sup>49</sup> Tobias, *supra* note 26, at 2001.

<sup>50</sup> See, e.g., Martin Schram, *Dems, GOP Reverse Roles on Court Picks*, BOSTON HERALD (Nov. 18, 2018, 12:00 AM), <https://www.bostonherald.com/2016/02/19/schram-dems-gop-reverse-roles-on-court-picks> [<https://perma.cc/E64M-62DA>] (explaining the rule’s invocation and opposition in 2008 and 2016); Letter from Sen. Patrick Leahy, Chairman, Senate Judiciary Comm., to George W. Bush, President of the United States (Mar. 20, 2008) (invoking the Rule in 2008).

<sup>51</sup> See Mitch McConnell, *Protecting American Justice: Ensuring Confirmation of Qualified Judicial Nominees*, Remarks Before the Senate Republican Conference, C-SPAN, at 01:07:15 (July 14, 2008), <https://www.c-span.org/video/?206379-1/judicial-confirmation-process&start=1832> (“[T]here is no Thurmond Rule.”).

<sup>52</sup> See DENIS STEVEN RUTKUS & KEVIN M. SCOTT, CONG. RSCH. SERV., RL34615, NOMINATION AND CONFIRMATION OF LOWER FEDERAL COURT JUDGES IN PRESIDENTIAL ELECTION YEARS 36 (2008) (observing that the date of the final judicial confirmation has not been consistent among the presidential election years since the Thurmond Rule was announced).

<sup>53</sup> The “Thurmond Rule” has been referred to by at least three different names, including the McConnell Rule and the Biden Rule. See Linge, *supra* note 26 (referring to the Rule as the “Biden Rule” in the context of a Supreme Court nomination); see also Gary Martin, *McConnell Rule? Biden Rule? The Politics Behind This Supreme Court Pick*, LAS VEGAS REV.-J. (Sept. 26, 2020, 7:21 AM), <https://www.reviewjournal.com/news/politics-and-government/mcconnell-rule-biden-rule-the-politics-behind-this-supreme-court-pick-2130400> [<https://perma.cc/6K5L-KDA6>] (referring to the Rule alternatively as the Biden Rule or the McConnell Rule).

<sup>54</sup> See Earle, *supra* note 68 (discussing the Judiciary Committee’s role in exercising the Rule).

<sup>55</sup> RUTKUS & SCOTT, *supra* note 52, at 9–10 (“Over time, Senator Thurmond and Republican leaders refined their use and practices under the rule to prevent the consideration of lifetime judicial appointments in the last year of a Presidency [unless the nominees under consideration were] consensus nominees.”(quoting 108 CONG. REC. 16,974 (2004) (statement of Sen. Leahy))).

<sup>56</sup> RUTKUS & SCOTT, *supra* note 52, at 9–10 (explaining that Senator Patrick Leahy invoked the Thurmond Rule when the Democratic Party controlled the Senate and President George W. Bush was in the White House).

and the *minority* party demands that it cease confirmations, purportedly so that the electorate may have a say in the filling of those vacancies.<sup>57</sup>

## II. THE EFFECTS OF ADHERENCE AND DEPARTURE

While the rules discussed here are unwritten, they are not inconsequential. Unwritten rules have both political and practical effects. The political effects, as discussed here, are those imposed by others in the system to punish defection or encourage adherence to the rules. The practical effects—such as confusion, uncertainty, or delay—are those that the enforcement of the rules themselves create, often by nature of being unwritten.

It is helpful to revisit the unwritten rules of baseball to demonstrate the distinction. Many of baseball's unwritten rules have “political” consequences. Sometimes rules will be enforced by criticism to the media or a scolding from the team manager.<sup>58</sup> Other times, the enforcement may be physical—players are known, or even expected, to retaliate for rule breaking with “vigilante ramifications” like hitting violators with pitches or initiating brawls with the opposing team.<sup>59</sup> These both fall into the category of “political” effects—the politics of the system being played out by its members.

On the other hand, the fact that baseball has so many unwritten rules has led to practical effects as well. Players don't always know which rules will be enforced; the rules that a veteran holds sacred may be unknown to a rookie, and players from different backgrounds have different concepts of violations

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<sup>57</sup> See *id.* (noting that Senator Strom Thurmond's request to stop confirmations came when the Republican Party was in the minority and President Jimmy Carter was in office).

<sup>58</sup> See Greg Kristan, *Unwritten Rules in Baseball*, STADIUM REVS., <https://thestadiumreviews.com/resources/unwritten-rules-in-baseball/> [<https://perma.cc/AS5X-2C6N>] (noting the threat of a “talking to by the manager” for a rookie who breaks the unwritten rules of pitching etiquette); Katherine Acquavella, *Fernando Tatis Jr.'s Grand Slam on 3-0 Count Angers Rangers and Sparks Talk over Baseball's Unwritten Rules*, CBS SPORTS (Aug. 19, 2020, 11:34 AM), <https://www.cbssports.com/mlb/news/Fernando-tatis-jr-s-grand-slam-on-3-0-count-angers-rangers-and-sparks-talk-over-baseballs-unwritten-rules/> [<https://perma.cc/V2UT-SH92>] (discussing an instance in which both the opposing manager and a player's own manager criticized the violation of an unwritten rule to reporters).

<sup>59</sup> See Tim Kurkjian, *The Unwritten Canon, Revealed*, ESPN, <http://espn.com/espn/print?id=10964445> [<https://perma.cc/R9UP-N92Y>] (last visited Oct. 9, 2021) (describing “drilling” and brawling as enduring punishments for violation of baseball's unwritten rules). Kurkjian puts the consequences of rule breaking bluntly: “If you disrespect [a player], their team or the game, you will pay, often with something in the ribs at 90 mph.” *Id.* at 2.

and their appropriate punishments.<sup>60</sup> This means that the way that baseball's unwritten rules play out may change wildly from one series to the next.

The same effects apply in the Senate. An example can be seen in the now-defunct “no pants” rule for women in the Senate. Politically, this unwritten rule was enforced by the “audible gasps” of colleagues and the Senate doorkeepers’ refusal to admit those who didn’t satisfy the dress code.<sup>61</sup> Practically, it was a source of confusion, because different doorkeepers observed different rules, and requests for a written dress code were rebuffed.<sup>62</sup> These effects do not have the same legislative importance—or constitutional impact—as those surrounding appointments, but they are typical of the Senate’s unwritten rules.

Politically, the actors who refuse to abide by the unwritten rules of the judicial appointments process may see their agendas stymied, their political power diminished, and their efforts at future cooperation rebuffed.<sup>63</sup> Practically, each of the rules addressed has numerous consequences. Senatorial courtesy, for instance, changes the bargaining strategies of the various parties involved in the nomination-confirmation process.<sup>64</sup> One of

<sup>60</sup> *Id.*

<sup>61</sup> See *The Evolution of the Pantsuit: A Debate that Continues, One Leg at a Time*, WASH. POST, <https://www.washingtonpost.com/archive/politics/2002/06/05/the-evolution-of-the-pantsuit-a-debate-that-continues-one-leg-at-a-time/53931c05-19ce-4372-b40a-9ee7ec6bf716/> [<https://perma.cc/QTb2-UUKX>] (last visited Oct. 3, 2021) (discussing how trousers were not initially “commonplace female attire in the offices of Washington”); Zeigenhorn, *supra* note 17 (“Though, again, it was not an official or written rule, the Senate employed ‘doorkeepers’ that decided who did and did not look appropriate to appear.”).

<sup>62</sup> Zeigenhorn, *supra* note 17.

<sup>63</sup> See, e.g., *Informal Practices of Congress*, UNIV. OF GRONINGEN, <http://www.let.rug.nl/usa/outlines/government-1991/the-legislative-branch-the-reach-of-congress/informal-practices-of-congress.php> [<https://perma.cc/5AKC-78UH>] (last visited Oct. 9, 2021) (“Those [Senators] who conform to the[] informal rules are more likely to be appointed to prestigious committees[,] or at least to committees that affect the interests of a significant portion of their constituents.”); Gerhardt, *Judicial Selection as War*, *supra* note 12, at 669-70 (“Hostilities break out in the process for selecting lower court judges . . . when the President, senators, and/or nominees violate some long-standing practices or expectations.”); Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687, 1688 (2001) [hereinafter *Norm Theory*] (“[P]olitical leaders’ compliance with and manipulation of norms can facilitate the fulfillment of personal or party agendas on federal appointments.”).

<sup>64</sup> See Sharp, *supra* note 30, at 775 (“[S]enators from the state housing [a] district court vacancy are likely to be more familiar than the President with potential nominees . . . . The President potentially has less interest in spending the political capital needed to overcome an objecting home-state

Thurmond Rule's effects is direct—it keeps *any* judges off the bench until the election of a new administration. It has also been argued, though, that the Thurmond Rule's impact extends past that to judges who are confirmed under circumstances in which the Rule should seemingly have enforced, and creates an “aura of illegitimacy” around their tenure.<sup>65</sup> The desirability of the unwritten rules (discussed in Part III) hinges on these political and practical effects.

#### A. *Political Effects*

In a political sense, adherence to the unwritten rules of judicial appointments is a safer strategy than defection.<sup>66</sup> Adherence can lead to increased bargaining around judicial appointments<sup>67</sup> and a move toward consensus nominees, rather than unilateral picks.<sup>68</sup> The same adherence, however, can result in an effective transfer of the nomination power from the President to the Senate.<sup>69</sup> Deviation, on the other hand, is almost always met with sanctions, sometimes even when it is a member of the party in power

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Senator regarding an individual district court nomination. As a result of the imbalance of interest in the appointment, senatorial courtesy allows the President to defer the nomination power to the home-state senators without substantial political sacrifice.”).

<sup>65</sup> Charles W. Collier, *The Unwritten Rules of Liberal Democracy*, 15 UNIV. MASS. L. REV. 197, 215 (2020).

<sup>66</sup> This depends to some degree on the extent to which a “rule” is recognized. A practice that is not acknowledged by other actors is unlikely to result in sanctions. As Professor Gerhardt has suggested, the existence of a “norm” may, in fact, be predicated on its enforcement via sanction. Gerhardt, *Norm Theory*, *supra* note 63, at 1698 (“The difference between a practice that triggers sanctions and one that does not is the difference between a norm and a practice that is not, or perhaps is no longer, a norm.”). It is important to note that the political consequences here are those that occur *within* the legislative process—not those that are imposed by the electorate. This discussion focuses on the effects of adherence or deviation on repeat play in the Senate, not on the chances that a particular senator will be re-elected.

<sup>67</sup> See PALMER, *supra* note 37, at 9 (observing that according to some analysts the blue-slip process originated so that senators could be more involved “in the ‘advice phase’ of a nomination.”).

<sup>68</sup> See Geoff Earle, *Senators Spar over ‘Thurmond Rule’*, THE HILL (July 21, 2004), <http://web.archive.org/web/20040722212816/http://www.hillnews.com/news/072104/thurmond.aspx> [<https://perma.cc/TZ53-TRUJ>] (noting that under the Thurmond Rule, “members don’t rule out action on widely popular nominees . . .”).

<sup>69</sup> See HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 171–72 (1988) (“Through the custom of senatorial courtesy, the senators may exercise a virtual veto over the president’s choice. The extent and nature of this exercise of power varies considerably with the senator . . . [some senators] jealously fight for this power to virtually dictate the choice of a particular nominee.”).

who deviates.<sup>70</sup> Deviation from the unwritten rules can diminish the political capital of an actor or lead to an escalation of obstructive tactics,<sup>71</sup> and often results in outright failure of the attempted action.<sup>72</sup>

The failure of executives to acknowledge the tradition of senatorial courtesy has led to “the most devastating defeats” suffered by presidents in the appointments process.<sup>73</sup> Analysts have noted that Presidents Grant, Hoover, and Carter all “immediately set their sights on challenging senatorial courtesy” and “paid enormous prices, particularly within their own parties, for their boldness.”<sup>74</sup> For Grant, that price came in the form of a defeated Supreme Court nomination; Hoover’s challenge to senatorial courtesy cost him control over his party’s domestic policy; Carter’s cost was frustration and embarrassment in other lower court appointments.<sup>75</sup> Carter’s difficulties in particular came from the ministrations of Ted Kennedy, the Judiciary Chair and a senator from Carter’s own Democratic Party.<sup>76</sup>

The penalties for attempting to buck these customs are not limited to the executive, either. Following the 2002 midterm elections, Judiciary Chair Orrin Hatch tried to “dial down” the blue-slip policy and announced an intention to hold hearings on nominees even where both home-state senators disapproved of the nominee.<sup>77</sup> Nevertheless, the disapproving senators used other tactics to maintain the status quo, and “[n]one of the nominees lacking the support of their home-state senators were confirmed . . . .”<sup>78</sup>

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<sup>70</sup> See Gerhardt, *Judicial Selection as War*, *supra* note 12, at 680 (“The first significant failure, which every president has made, is not to consult with the senator(s) from his party in the state for the judgeship(s) he is trying to fill. This failure is almost invariably fatal to the nomination’s success, and perhaps most surprising, triggers sanctions not from senators from the opposition party but from the President’s own party.”).

<sup>71</sup> See *id.* at 682 (including “protecting senatorial courtesy” and “payback” in a list of reasons for which senators might obstruct judicial nominations).

<sup>72</sup> See *id.* at 680 (“Th[e] failure [to consult with the home-state senator] is almost invariably fatal to the nomination’s success . . . .”).

<sup>73</sup> *Id.* at 675.

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

<sup>75</sup> *Id.* at 675–76.

<sup>76</sup> *Id.* at 676. Kennedy would later challenge Carter in the 1980 primary as part of what has been referred to as a “civil war” within the Democratic party. See JON WARD, *CAMELOT’S END: KENNEDY VS. CARTER AND THE FIGHT THAT BROKE THE DEMOCRATIC PARTY* (2019) (describing the events of that primary race).

<sup>77</sup> Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 97 (2017).

<sup>78</sup> *Id.* at 98.

In 2018 and 2019, multiple judges were sent to the Senate at large despite unreturned blue-slips under the tenure of Judiciary Chairs Chuck Grassley and Lindsey Graham.<sup>79</sup> In response to one of these advanced nominations, ranking member Dianne Feinstein suggested that it was likely the flouting of blue-slip procedure would “com[e] back to bite Republicans when they [were] no longer in power in the Senate.”<sup>80</sup> This has indeed become a point of contention in the new senate, as the Judiciary Chair Dick Durbin has moved forward with at least one circuit court nominee thus far despite a lack of support from home-state senators.<sup>81</sup> These events portend the possibility that Republican senators may continue to pay a price in the new Senate in the form of diminished respect for their own blue-slip objections, especially if the progressive wing of the Democratic Party has its way.<sup>82</sup>

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<sup>79</sup> See Sen. Chuck Grassley, *Grassley Statement at Hearing to Consider 3rd Circuit and Other Judicial Nominees* (Nov. 13, 2018), <https://www.grassley.senate.gov/news/news-releases/grassley-statement-hearing-consider-3rd-circuit-and-other-judicial-nominees> [<https://perma.cc/79P8-DJNA>] (discussing the advancement of Judge Paul B. Matey despite withheld blue-slips); Jordain Carney, *Trump Court Picks Confirmed Despite No Blue Slip from Schumer, Gillibrand*, THE HILL (May 8, 2019, 11:22 AM), <https://thehill.com/homenews/senate/442689-trump-court-pick-confirmed-despite-no-blue-slip-from-schumer-gillibrand> [<https://perma.cc/T2KK-T4U3>] (discussing the confirmation of Judge Joseph Bianco); Deanna Paul, *‘Damaging Precedent’: Conservative Federal Judge Installed Without Consent of Home-state Senators*, WASH. POST (Feb. 28, 2019), <https://www.washingtonpost.com/politics/2019/02/27/dangerous-first-conservative-judge-installed-after-vetting-by-only-two-senators/> [<https://perma.cc/KZB8-BLLP>] (discussing the installment of Judge Eric Miller); Caroline S. Engelmayer, *Senate Panel Approves Judge over Objection by California Lawmakers*, L.A. TIMES (June 20, 2019, 11:50 AM), <https://www.latimes.com/nation/politics/la-na-pol-senate-judge-bress-california-20190620-story.html> [<https://perma.cc/M47P-XKDJ>] (discussing the advancement of Judge Daniel Bress).

<sup>80</sup> See Paul, *supra* note 79.

<sup>81</sup> Marianne LeVine, *How Senate Dems Reaped the Benefits from 2 Little-Known GOP Manuevers*, POLITICO (Jan. 26, 2022, 4:31 AM), <https://www.politico.com/news/2022/01/26/senate-confirmation-biden-judicial-nominees-00001682> [<https://perma.cc/24CA-A9KX>] (“Durbin . . . mov[ed] forward on a circuit court nominee who would represent Tennessee and lacked support from both GOP [Senators] Marsha Blackburn and Bill Hagerty.”) See also Marianne LeVine, *The One Biden Priority Democrats Are Convinced They Can Get Done*, POLITICO (June 15, 2021, 4:31 AM), <https://www.politico.com/news/2021/06/15/biden-democrats-judges-494292> [<https://perma.cc/8QYG-W87K>] (“Like Grassley and Graham, his predecessors at the helm of the Judiciary panel, [Judiciary Chair Dick] Durbin is keeping blue slips for district court nominees but scrapping them for circuit court picks who oversee multiple states. Progressives are pushing to do away with the tradition altogether, but that proposal has yet to gain traction.”).

<sup>82</sup> President Biden’s first judicial nomination in a state represented exclusively by Republican Senators has set the battleground to test whether the Democrats’ resolve holds on retaliating against the previous disregard for blue slips. See James Arkin, *Tenn. GOP Sens. Criticize White House Over 6th Circ. Nom*, LAW360 (Nov. 18, 2021, 1:11 PM), <https://www.law360.com/articles/1441804/tenn-gop->

The retaliatory obstruction that accompanies a deviation, as in the Hatch incident described above, is generally characteristic of the unwritten rules. Defiance of senatorial courtesy has been cited as a reason for the rise of the filibuster as a weapon to oppose appointments,<sup>83</sup> and commentators have observed a general cycle of escalating obstruction in response to deviations from the unwritten rules.<sup>84</sup> Sometimes, as with the Hatch example, the obstruction takes the form of using different Senate procedures to reach the same result that deviation was intended to prevent. Other times, as Senator Feinstein's threat alluded, the obstruction takes the form of retaliation-in-kind—the continued restriction or expansion of the unwritten rule's use, now applied in the opposite direction once power has changed hands.

The exercise of the Thurmond Rule has led to consequences of both types. First, retaliation-by-obstruction, such as in 1992 when attempts to block earlier nominations to “preserve the vacancies” for the incoming President Clinton caused the nomination of Sonia Sotomayor to a district court vacancy to be delayed “apparently in retaliation.”<sup>85</sup> In the same year, the second type of retaliation—retaliation-in-kind—seems to have been exercised by the Judiciary committee in preventing consideration of dozens

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sens-criticize-white-house-over-6th-circ-nom (“Tennessee’s two Republican senators criticized President Joe Biden’s nomination . . . to the Sixth Circuit, saying the administration broke tradition by not meaningfully consulting with home state senators before announcing a judicial pick.”). Commentary regarding the nomination has posited that the “[o]pposition . . . would not be likely to stall [the] nomination” due to Republicans’ earlier treatment of circuit court nominations while in the majority. *Id.* One of Tennessee’s senators claimed to have not received a blue slip at all in the nomination process, leading Chuck Grassley, who as Judiciary Chair began this cycle of disregarding blue-slip procedure, to refer to Durbin’s move as “a severe change from past practices.” Rose Wagner, *After the Blue Slip Burned with Trump in Office, Biden-Era Republicans Feel Its Absence*, COURTHOUSE NEWS SERV. (Jan. 12, 2022), <https://www.courthousenews.com/after-the-blue-slip-burned-with-trump-in-office-biden-era-republicans-feel-its-absence/> [<https://perma.cc/SXB5-762Q>].

<sup>83</sup> See PALMER, *supra* note 37, at 12 (“One reason [for the absence of mentions of the word filibuster in historical analyses of nominations from the early twentieth century] could be that the other devices in place—the blue slip and senatorial courtesy—allowed Senators to prevent confirmation by the full Senate when they were concerned about a particular nomination.”).

<sup>84</sup> See, e.g., Chafetz, *supra* note 77, at 118 (“The minority party increasingly seizes on the tools of obstruction, frustrating the majority. The majority strikes back, through mechanisms like reducing deference to home-state senators and issuing recess appointments. This, in turn, enrages the minority, which ramps up obstruction still further.”).

<sup>85</sup> RUTKUS & SCOTT, *supra* note 52, at 23–24.

of nominees.<sup>86</sup> This retaliation-in-kind may be evidenced by the general trend between 1980 and 2016 in which the date of the last Circuit Court confirmation receded from mid-December to late June of the election year, and then in 2016 all the way back to January.<sup>87</sup> In fact, the invocation of the Thurmond Rule to obstruct the nomination of Judge Merrick Garland to the Court in 2016 was often defended as nothing more than an escalation of this type in response to the alleged prior obstruction by Democrats.<sup>88</sup>

### B. Practical Effects

Practically speaking, the effect of the unwritten rules of the appointment process is dictated by the answer to the questions they raise. There are four questions that can be asked of any unwritten rule, each of which is dispositive of the rule's effect. First, does the unwritten rule exist at all, which is to say, has it really been practiced, or has it just been spoken into existence? Second, what obligations does the rule create? Third, for what set of appointments does the rule apply, if it should be honored? Does it apply to local nominations alone, or should it be adhered to for national offices as well? Is it limited to judicial nominees, cabinet nominees, or subcabinet nominees? And fourth, what conditions are prerequisite to the exercise of the unwritten rule? Must it be raised by a senator from a certain party? Is it only useful in a constrained timeframe? Must the objection take a certain form?

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<sup>86</sup> See *id.* at 24 (quoting Senator Howard Metzenbaum, who invoked Strom Thurmond's prior actions in "shutting down entirely the question of judicial nominees" as justification for the failure to process nominations).

<sup>87</sup> *Id.* at 36. The last confirmation in 2004 was on June 24th. *Id.* The last circuit confirmation in 2008 was also on June 24th. *Confirmation of Raymond Ketheridge*, P.N. 343, 110th Cong. § 2 (2008). The last circuit confirmation in 2012 was on June 12th. *Andrew David Hurwitz*, FEDERAL JUDICIAL CENTER. The last circuit confirmation in 2016 was on January 11th. *Confirmation of Luis Felipe Restrepo*, P.N. 11, 114th Cong. § 2 (2016). Notably, the 116th Congress confirmed a circuit judge in December 2020, bucking this trend and confirming a lame-duck nominee for the first time in over 120 years. *Confirmation of Thomas L. Kirsch, II*, P.N. 2333, 116th Cong. § 2 (2020); see also *Senate Keeps Confirming Trump Nominees*, HAMODIA (Nov. 30, 2020), <https://hamodia.com/2020/11/30/senate-keeps-confirming-trump-nominees> [<https://perma.cc/T2EG-NSL6>] (referencing the unusual choice to reopen confirmations).

<sup>88</sup> See Margaret Sullivan, *The Tortured Logic from Right-wing Media About Replacing Ruth Bader Ginsburg*, WASH. POST (Sept. 19, 2020), [https://www.washingtonpost.com/lifestyle/media/ginsburg-conservative-media-react/2020/09/19/b7a725a2-fa7e-11ea-89e3-4b9efa36dc64\\_story.html](https://www.washingtonpost.com/lifestyle/media/ginsburg-conservative-media-react/2020/09/19/b7a725a2-fa7e-11ea-89e3-4b9efa36dc64_story.html) [<https://perma.cc/7UQK-73HD>] (referring to the defense that "what goes around comes around" based on the hypothetical invocation by Democrats of the "Biden Rule").

These questions are evident in the debates whenever an unwritten rule is raised, and it is plain to see that the answer to any of them could decide the question at hand. If a rule does not exist, it can be dismissed outright; if it does not need to be honored here, the matter can proceed. If the rule doesn't apply to the situation, or hasn't been raised properly, it need not be enforced. As such, each of these questions is key—and if the answers are left unwritten, they may change from one instance to the next.

Senatorial courtesy is subject to three of these four questions each time it (or the blue-slip process) is debated. While the first question (the rule's existence) is usually considered settled due to the long history of the unwritten rule,<sup>89</sup> the answers to the other questions are less clear. The second question (if the rule should be honored) is characteristic of the rule's exercise because “the determination of just how much weight to give a Senator's opposition . . . is left largely up to the chair of the [Judiciary] [C]ommittee.”<sup>90</sup> Certainly, the rule is not absolute.<sup>91</sup> Thus, while the objecting party generally insists that the rule *should* be honored, the governing party may disagree depending on the political circumstances.<sup>92</sup>

The third question (the scope of the rule) is the subject to much debate. While it is largely accepted that courtesy should apply to district court nominations (if it is honored at all),<sup>93</sup> the exact contours of the rule are unclear when it comes to circuit courts, Supreme Court justices, or non-judicial appointments.<sup>94</sup>

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<sup>89</sup> See Gerhardt, *Norm Theory*, *supra* note 63, at 1702 (“Senatorial courtesy is an especially durable norm.”).

<sup>90</sup> PALMER, *supra* note 37, at 9.

<sup>91</sup> *Id.* at 7.

<sup>92</sup> See, e.g., Jordain Carney, *Senate Battle Heats up over ‘Blue Slips’, Trump Court Picks*, THE HILL (Oct. 11, 2017, 1:54 PM), <https://thehill.com/homenews/senate/354955-senators-battle-over-trumps-court-nominees> [<https://perma.cc/K745-HHJX>] (summarizing the parties’ “rhetorical shots” about blue slips in which the Republican majority described blue slips “as simply [a] notification of how [a senator is] going to vote” while the Democratic minority argued that the majority should honor “the traditions of the Senate” in enforcing a stricter policy).

<sup>93</sup> See PALMER, *supra* note 37, at 8 (“[T]he courtesy tradition became so ingrained with judicial nominations to district courts that Senator [Robert P.] Griffin wrote about the practice in 1969: ‘It is a fact . . . that judges of the lower federal courts are actually ‘nominated’ by Senators while the President exercises nothing more than a veto authority.’”).

<sup>94</sup> See Sharp, *supra* note 300, at 755 (“[T]he role of senatorial courtesy in circuit court nominations is considerably smaller than the ‘prime’ role senatorial courtesy plays in district court recruitment.”); Senatorial Courtesy, 1 Op. O.L.C. 88, 90 (2013) (recounting an instance in which a Senator

Finally, the fourth question (prerequisite conditions) has reared its head as well. There have been changes over time as to how the tradition must be invoked,<sup>95</sup> and Senators have disagreed as to whether the opposition must have some substance beyond the traditional “personally obnoxious” objection.<sup>96</sup>

Because each of the questions is subject to interpretations that will satisfy the party seeking to exercise the rule (or to prevent its use), the outcome in each case has as much to do with power and politics as with “rules” of any kind. We take the Thurmond Rule as an example. The first question asked is seemingly the simplest: does this rule exist, despite not being codified? And yet, despite its simplicity, even this question is subject to different answers at different times—even from the same individuals.

In 2008, Senator Patrick Leahy, then Chairman of the Judiciary Committee, warned outgoing President George W. Bush that he wanted to “make progress [on nominations] before time runs out on [the] Presidency and the Thurmond Rule precludes additional confirmations.”<sup>97</sup> In response, Senator Chuck Grassley accused Democrats of “using the so-called Thurmond Rule to justify grinding the judicial nomination process to a halt” and called the rule itself “just plain bunk,” asserting that “the reality is that the Senate has never stopped confirming judicial nominees during the last few months of a President’s term.”<sup>98</sup> Senator Mitch McConnell was similarly definitive, saying that “I think it’s clear that there is no Thurmond Rule. And I think the facts demonstrate that.”<sup>99</sup>

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expressed uncertainty about the application of senatorial courtesy to appointments by the Postmaster General); Allison Stevens, *Trump Has Appointed Judges at a Breakneck Speed. More Are Coming*, NC POLICY WATCH (Jan. 6, 2020), <http://www.ncpolicywatch.com/2020/01/06/trump-has-appointed-judges-at-a-breakneck-speed-more-are-coming/> [https://perma.cc/P7MX-CVR3] (referencing an attempt to block a Ninth Circuit appointment via senatorial courtesy).

<sup>95</sup> While “[h]istorically, a Senator has stood on the floor of the chamber and said that the nomination was ‘personally obnoxious[.]’ modern objections are ‘made before the nomination ever [makes] it to the floor for a vote’ and may occur in a hearing or behind closed doors. See PALMER, *supra* note 37, at 7–8.

<sup>96</sup> See *id.* at 7 (“There has been disagreement within the Senate about whether or not a Senator needs to state the grounds for an objection.”).

<sup>97</sup> Letter from Sen. Patrick Leahy, Chairman, Senate Judiciary Comm., to George W. Bush, President of the United States (Mar. 20, 2008).

<sup>98</sup> Chuck Grassley, *Judicial Confirmation Process*, C-SPAN.ORG (July 14, 2008) <https://www.c-span.org/video/?206379-1/judicial-confirmation-process&start=1832>.

<sup>99</sup> Mitch McConnell, *Judicial Confirmation Process*, C-SPAN.ORG (July 14, 2008) <https://www.c-span.org/video/?206379-1/judicial-confirmation-process&start=1832>.

In 2016, the roles were reversed. Senator Grassley, now the Judiciary Chair, declared that “[t]he fact of the matter is that it’s been standard practice over the last 80 years [not to] confirm Supreme Court nominees during a presidential election year.”<sup>100</sup> Senator McConnell also pushed for (and received) a halt to confirmations nearly nine months before the election, stating that “[the Supreme Court] vacancy should not be filled until we have a new president.”<sup>101</sup> McConnell then abandoned this position in 2020 after the passing of Justice Ruth Bader Ginsburg, arguing instead that this Supreme Court vacancy *should* be filled, so that the electorate could consider the Senate’s decision to fill it when voting in the upcoming election.<sup>102</sup> There are further examples of inconsistency in the Rule’s application,<sup>103</sup> but even without being exhaustive the point is clear: with unwritten rules like these, even the existence of the rule may be a matter for debate. At the risk of stating the obvious, rules that do not exist have little ground for enforcement, making this question a dispositive one.

The question of whether the rule should be honored is often tied up in the question of whether it exists—most actors who don’t believe the

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<sup>100</sup> Lydia Wheeler, *Judiciary Chair: ‘Standard Practice’ to Not Confirm SCOTUS Nominee in Election Year*, THE HILL (Feb. 13, 2016, 7:39 PM), <https://thehill.com/regulation/court-battles/269398-senate-judiciary-chair-wait-until-election-is-over-to-fill-scalias> [<https://perma.cc/622W-E232>].

<sup>101</sup> Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016, 9:56 PM), <https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248#ixzz40L39Q7rJ> [<https://perma.cc/HPX5-Q454>].

<sup>102</sup> Morgan Watkins, *Mitch McConnell: Confirmation of Amy Coney Barrett a ‘Capstone’ to Judiciary Work*, LOUISVILLE COURIER JOURNAL (Oct. 27, 2020, 4:02 PM), <https://www.courier-journal.com/story/news/politics/mitch-mcconnell/2020/10/27/mitch-mcconnell-amy-coney-barrett-capstone-his-judiciary-work/3746900001/> [<https://perma.cc/NEN3-CZX5>]. Following this paradoxical logic, McConnell held confirmation proceedings, and the vacancy was filled eight days before the 2020 General Election. *Confirmation of Amy Coney Barrett*, PN2252, 116th Cong. (Oct. 26, 2020). McConnell has since signaled that he intends to wield the Thurmond Rule once again if a vacancy should arise under a Republican-controlled Senate in the second half of President Biden’s term. See Interview by Hugh Hewitt with Mitch McConnell, Senate Majority Leader, (June 14, 2021) (reporting McConnell’s thoughts on Supreme Court confirmations). McConnell tied this to a claim that “in the middle of a presidential election, if you have a Senate of the opposite party of the president, you have to go back to the 1880s to find the last time a vacancy was filled.” See *id.* As discussed below, this assertion relies on a selective interpretation of what qualifies as the “middle” of an election; Justice Kennedy was confirmed in February of 1988. See *infra* note 110 and accompanying text.

<sup>103</sup> E.g., *What Republicans Said About Supreme Court Nominations During George W. Bush’s Last Year*, HISTORY NEWS NETWORK, Geo. Wash. (Feb. 16, 2016), <http://historynewsnetwork.org/article/162033> [<https://perma.cc/64DV-2VBA>] (highlighting republican senators’ comments on the Thurmond rule).

Thurmond Rule is a true “rule” don’t believe it should be enforced. Even among those who acknowledge the rule generally, there has been argument about whether to honor the rule in particular situations. In the Bush-era scenario discussed above, Patrick Leahy acknowledged the Rule, and even wielded it as Judiciary chair. Yet, it was Senator Leahy who opposed the tactic in 2016, reportedly “whipp[ing] out his own pocket Constitution” to make an argument in favor of confirmation.<sup>104</sup> Here, much of the argument for or against honoring the rule ties back to whether it was honored in the past—and those against honoring it often change their mind about whether that was the case.<sup>105</sup>

The third question, what the boundaries of the rule are, has also been subject to varied interpretation. Analysis of the Rule’s prior application found that while Democratic Party senators tended to “directly apply the Rule only to controversial picks,” allowing votes on consensus nominees, Republicans were far less discriminating.<sup>106</sup> Additionally, as discussed above, the question of when the “curtain comes down” on nominations is very much undecided—while the party invoking the rule generally argues that they are only adhering to the established date,<sup>107</sup> there have been only two instances in 40 years where the last confirmation prior to the election was at the same time or later than in the preceding presidential election year.<sup>108</sup>

Finally, the question of prerequisites is another for which the answers are unclear. Although, as discussed above, the Rule was originally invoked by the *minority* party to preserve vacancies for an incoming president, the Rule’s 2008, 2012, and 2016 invocations were all made by the *majority* party. The opposition generally invokes the Rule, but its execution is less fixed. In 1980,

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<sup>104</sup> Schram, *supra* note 50.

<sup>105</sup> See, e.g., Daniel Victor, *What Is the ‘Thurmond Rule?’*, N.Y. TIMES (Feb. 13, 2016, 7:11 PM), <https://www.nytimes.com/live/supreme-court-justice-antonin-scalia-dies-at-79/what-is-the-thurmond-rule/> [<https://perma.cc/7LVT-DXYK>] (noting that even before his use of the rule in 2016, Sen. Mitch McConnell invoked the rule against circuit court judges in 2012); Andrew Rosenthal, *The Thurmond Rule*, N.Y. TIMES (June 15, 2012, 4:13 PM), <https://takingnote.blogs.nytimes.com/2012/06/15/the-thurmond-rule/> [<https://perma.cc/9DKC-CGMW>] (observing that Republican senators justified McConnell’s 2012 invocation on the grounds that “Republicans have been plenty cooperative” and that the Rule has “always been used”).

<sup>106</sup> Tobias, *supra* note 26, at 2004.

<sup>107</sup> See Rosenthal, *supra* note 105 (quoting Sen. John Cornyn’s assertion that “this is about the time. This is traditionally when the curtain comes down on circuit court judges.”).

<sup>108</sup> See Paul, *supra* note 80.

the fact that Thurmond's party was the minority didn't preclude the nascent Rule's use to preserve certain judicial vacancies.<sup>109</sup> And in 1988, Reagan-nominee Anthony Kennedy (along with several other district and circuit judges) was confirmed to the Supreme Court by a Democratic Majority Senate despite the Rule's recent advent.<sup>110</sup> After Joe Biden was elected President in November 2020, the Senate majority continued to confirm existing nominees long into December.<sup>111</sup>

In those three examples, we see a minority managing to keep vacancies unfilled for an incoming president of the same party, a majority continuing to act on vacancies for an outgoing opposition president, and a majority continuing to fill vacancies on behalf of an outgoing president of the same party. This demonstrates that there is no consensus regarding the prerequisites for application of the Thurmond Rule. This set of Thurmond Rule examples is demonstrative of the general status of unwritten rules for appointments—that the effect of invoking such a rule is not fixed, and in fact depends more on the whims of the Senate majority than on any mandatory power behind the rule.

### III. DESIRABILITY

Overall, the unwritten rules here have the effect of inviting political retaliation, obstruction, and confusion—essentially, unpredictability and partisan conflict. *Some* degree of conflict may be a desirable and indeed intended outcome of the constitutional structure that “pits presidents and senators against each other.”<sup>112</sup> But it is hard to believe that the degree to which partisanship and unpredictability govern the appointments process could ever have been the intent. While the Constitution was intended to

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<sup>109</sup> RUTKUS & SCOTT, *supra* note 52, at 8.

<sup>110</sup> Tobias, *supra* note 26, at 2002.

<sup>111</sup> Chris Cioffi, *Trump Lost, But the Senate Keeps Confirming His Nominees. Lame-Duck Presidents Usually Don't Get This Treatment*, ROLL CALL (Nov. 30, 2020, 11:00 AM), <https://www.rollcall.com/2020/11/30/trump-lost-but-the-senate-keeps-confirming-his-nominees> [<https://perma.cc/KU4P-TTK9>]; see also *Confirmation of Thomas L. Kirsch, II*, *supra* note 87 (confirming a circuit judicial nominee in December 2020).

<sup>112</sup> Gerhardt, *Judicial Selection as War*, *supra* note 12, at 669. Justice Scalia, for instance, believed that gridlock is “what the system is designed for” and serves to prevent the concentration of power and promote “only good legislation.” Ashby Jones, *Justice Scalia on Gridlock: It's 'What the System Is Designed For'*, WALL ST. J. (Dec. 19, 2013, 1:11 PM), <https://www.wsj.com/articles/BL-LB-46677> [<https://perma.cc/53F3-2YSQ>].

invite conflict so that “ambition [would] be made to counteract ambition,”<sup>113</sup> the Thurmond Rule instead “invites partisan manipulation, shifting with the political winds to suit both parties’ distinct needs.”<sup>114</sup> Likewise, the tradition of senatorial courtesy deviates from the constitutional structure—rather than undertaking its duty of advice and consent, through senatorial courtesy and the blue-slip process “the Senate has effectively placed the power of confirmation assigned to the entire senatorial body in the hands of either of the two home-state senators.”<sup>115</sup> Broadly, not only do the unwritten rules potentially deviate from constitutional structure, they make it “difficult, if not impossible, to know *why* certain things either happened or did not happen in the legislative process[].”<sup>116</sup>

Partisanship is one undesirable outcome of the unwritten rulebook. One concern with blue-slipping and senatorial courtesy “is that the blue slip has been used . . . to select judges on a political, not professional, basis” and as such “is a perversion of what the founders intended.”<sup>117</sup> Similarly, “[c]hronic partisanship attends the Thurmond Rule’s deployment, significantly propelling the splenetic confirmation wars across modern presidential years.”<sup>118</sup> The outcome of these political influences is, as demonstrated in the examples discussed above, that party power matters far more than “rules” in these scenarios.

Unpredictability is a key element of these unwritten rules and, perhaps even more so than partisanship, makes them undesirable. One “principal problem” parliamentarians have faced in advising the Senate regarding senatorial courtesy is that “[i]t is a difficult rule to apply because . . . the precedents on it are conflicting.”<sup>119</sup> This is coupled with the concern that in Senate procedure “there are plenty of precedents to go around in order to legitimate any particular outcome.”<sup>120</sup> The unwritten rules “apply differently to different political appointments, and apply with different intensity and to different degrees, depending on such factors as the relative

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113 THE FEDERALIST NO. 51 (James Madison).

114 Tobias, *supra* note 26, at 2001.

115 Sharp, *supra* note 30, at 756.

116 Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 757 (2008) (emphasis added).

117 SOLLENBERGER, *supra* note 25, at 3.

118 Tobias, *supra* note 26, at 2010.

119 “Personally Obnoxious”? Senatorial “Courtesy” and Judicial Nominations, *supra* note 28.

120 Chafetz, *supra* note 77, at 130 (internal quotation marks omitted) (quoting JEROME FRANK, LAW AND THE MODERN MIND, 152 (Steven & Sons Limited 1949) (1930)).

numbers of offices to which nominations are made, the tenure and scope of responsibility of the offices in question, the relative ease of defeating certain appointments in committee, and the relative robustness and certainty of the applicable norms.”<sup>121</sup>

Judiciary Chair Chuck Grassley said about blue slips that “because there is no hard and fast rule, the best way [he knew] how to proceed [was] to look to what has been done in the past, and roughly follow the examples of [his] predecessors.”<sup>122</sup> Where the best way to proceed is by “roughly follow[ing]” precedent, the result of any single objection or withheld blue slip is far from certain. As one op-ed writer put it, “even Chuck Grassley must worry that a future Senate Judiciary Committee chairperson might not apply this informal tradition in his even-handed manner.”<sup>123</sup>

The Thurmond Rule is subject to the same criticisms, in particular that each invocation of the rule sets new and potentially conflicting precedent that can be “routinely manipulated in constitutional debates.”<sup>124</sup> This unpredictability makes the Rule “far too easy to abandon when faced with abstract appeals to democracy” and could gradually change the scope of the executive’s appointment power.<sup>125</sup> As with senatorial courtesy, the outcome of a particular invocation of the Thurmond Rule is not tied to the Rule’s existence at all.

This problem with the Thurmond Rule has become particularly poignant in recent years. Regardless of individual opinions about whether the confirmations were normatively “good” or “bad,” no one could argue that the installation of Justices Gorsuch and Barrett onto the Supreme Court is not an incredibly significant shift in the ideological balance of the judiciary. These confirmations depended on the ambiguity inherent in the unwritten Thurmond Rule. At minimum, the ambiguity surrounding this rule allowed for inconsistent justifications for the Senate’s confirmation decisions. In

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<sup>121</sup> Gerhardt, *Norm Theory*, *supra* note 63, at 1714.

<sup>122</sup> Wheeler, *The “Thurmond Rule” and Other Advice and Consent Myths*, *supra* note 28.

<sup>123</sup> *Id.*; John Zeller, Letter to the Editor, *In U.S., Unwritten Rules Are Meant to be Broken*, DES MOINES REG. (May 5, 2016, 12:02 AM), <https://www.desmoinesregister.com/story/opinion/readers/2016/05/05/us-unwritten-rules-meant-broken/83873882/> [<https://perma.cc/93QX-PTP8>].

<sup>124</sup> Michael J. Gerhardt, *Practice Makes Precedent*, 131 HARV. L. REV. F. 32, 36, 39 (2017).

<sup>125</sup> Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say about President Obama’s Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 86 (2016).

2016, Mitch McConnell argued that the American people should vote on a new president before the confirmation of a new justice, so that their voices could be heard on the matter.<sup>126</sup> In 2020, he argued that the people needed to have a new justice installed before they voted, so that they could evaluate the quality of that decision when casting their ballots.<sup>127</sup> Because the Thurmond Rule exists in the ether, rather than on a sheet of paper, this kind of pretzel logic (combined with partisan power) can determine the outcome of a given nomination.

To have so-called “rules” that cannot be predictably employed is untenable. Senate traditions and a “patrician sense of courtesy” are no longer the “strong force for stability” that they once were.<sup>128</sup> The fact that partisanship alone seems to govern the outcome of the appointments process is just icing on the cake. It is clear that something must be done to ensure that these rules are either given consistent effect or removed from the playing field altogether.

#### IV. OPTIONS FOR REFORM

There are three paths to reform of these unwritten rules through two different branches of the government. First is the judicial path. While the judiciary does not often weigh in on the Senate’s rules,<sup>129</sup> those rules are subject to a limited scope of judicial review.<sup>130</sup> The second option is codification—action by the Senate to turn these unwritten rules into written rules. Finally, the last option is abrogation—essentially the negative form of codification, in which the Senate would make the application of an unwritten rule impermissible, and so end the questions regarding it altogether. Each option has its benefits and impracticalities, but ultimately it is clear that

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<sup>126</sup> Everett & Thrush, *supra* note 101.

<sup>127</sup> See Watkins, *supra* note 102 (quoting Mitch McConnell’s assertion that “I wanted to get [then-Judge Barrett] confirmed as soon as possible, preferably before the election, because I think the American people are entitled to weigh our decision to move forward with this judge in the election if they choose to.”).

<sup>128</sup> Roberts, *supra* note 8, at 2193.

<sup>129</sup> See Gerhardt, *Non-Judicial Precedent*, *supra* note 116, at 716–17 (“Very few of the constitutional judgments of non-judicial authorities are subject to judicial review. Courts not only uphold an overwhelming number of non-judicial activities they review, but they also defer to non-judicial precedents in various forms, such as historical practices, traditions, and customs.”).

<sup>130</sup> See, e.g., *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1170 (D.C. Cir. 1982) (“[I]f Congress should adopt internal procedures which ‘ignore constitutional restraints or violate fundamental rights,’ it is clear that we must provide remedial action.”) (quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892)).

codification is the most advantageous—and indeed most feasible—avenue to take.

#### A. *The Judicial Option*

The judicial path is the most permanent but also the most inaccessible of the options available to rectify the problems associated with unwritten rules. The House and Senate may set their own rules,<sup>131</sup> and it has long been established that the judiciary only has a narrow scope to examine these rules once a chamber has determined them.<sup>132</sup> The status of a rule as “unwritten” might complicate a court’s analysis, but it would still not preclude a finding regarding unconstitutionality.<sup>133</sup> If a court—or the Supreme Court, as seems likely in a case of such import—were to assess the constitutionality of a Senate rule or analyze its meaning, that interpretation would be entitled to a powerful protection in *stare decisis*, while a Senate rule of the type discussed for Codification or Abrogation could be revoked by a later Senate (albeit with some difficulty).

Courts are incredibly hesitant to take up the validity of Congressional rules without “violation of an express constraint in the Constitution or an individual’s fundamental rights.”<sup>134</sup> Even where review is undertaken, the interpretation of those rules is subject to extreme deference, because “[w]here . . . a court cannot be confident that its interpretation is correct, there is too great a chance that it will interpret the Rule differently than would the Congress itself.”<sup>135</sup> The key question in exploring the judicial

<sup>131</sup> U.S. CONST. art. I § 5.

<sup>132</sup> See e.g., *United States v. Ballin*, 144 U.S. 1, 5–6 (1892) (“[Congress] may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained . . . . [But where] [t]he Constitution has prescribed no method of making [a] determination [] it is therefore within the competency of the house to prescribe any method which shall be reasonably [effective].”).

<sup>133</sup> See Gerhardt, *Practice Makes Precedent*, *supra* note 124, at 36 (“If the Supreme Court were ever to analyze the constitutionality of a Senate rule or practice, such as the filibuster or deployment of the nuclear option, the fact that one is a rule and the other is a practice within the Senate would not bind the Supreme Court’s determination.”).

<sup>134</sup> *Common Cause v. Biden*, 909 F. Supp. 2d 9, 13 (D.D.C. 2012).

<sup>135</sup> *United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995). In such an instance, “the court would effectively be making the Rules—a power that the Rulemaking Clause reserves to each House alone.” *Id.* at 1306-07.

option becomes whether the Thurmond Rule or senatorial courtesy defies an “express constraint” in the Constitution.

Certainly, it has been argued that senatorial courtesy violates the *spirit* of the Appointments Clause. The Appointments Clause “is more than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme.”<sup>136</sup> And the purpose of this Clause—to ensure that the President is accountable for the appointment of federal officers<sup>137</sup>—is undermined if one result of senatorial courtesy is that the “judges of the lower federal courts are actually ‘nominated’ by Senators while the President exercises nothing more than a veto authority.”<sup>138</sup> However, there is no *express* constraint in the Constitution. The language of the Nomination Clause and Appointment Clause “clearly meant different things to different framers of the Constitution.”<sup>139</sup> It is thus unlikely that a court could find any “express constraint” in the language that lays out the Senate’s duty of advice and consent that is specific enough to prohibit senatorial courtesy.

There is also a case to be made that the Thurmond Rule undermines constitutional intent. Opponents of the rule have argued that “Section 2, Article 2 does not terminate the Senate’s ‘advice and consent’ function . . . despite any ‘Thurmond Rule[]’ once it leaves town in July for a month and a half of party conventions and presidential election year campaigning.”<sup>140</sup> Analysis in the context of the Garland-Gorsuch saga suggested that the rule “implicate[s] a deeper problem of separation of powers” by “refus[ing] to consider any nominee from a particular President with the express purpose of transferring his appointment powers to a successor.”<sup>141</sup> Again, though, the problem is whether this runs afoul of an *express* constraint. Because the exact effect of ‘advice and consent’ on this distribution of power “has been disputed almost since the beginning of the Republic,”<sup>142</sup> it is hard to know what express constraint a court could seize upon to decide the rule’s validity.

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<sup>136</sup> Edmond v. United States, 520 U.S. 651, 659 (1997) (internal quotations marks omitted) (citing Buckley v. Valeo, 424 U.S. 1, 125 (1976) (per curiam)).

<sup>137</sup> *Id.*

<sup>138</sup> PALMER, *supra* note 37, at 8 (quoting Robert P. Griffin, *The Broad Role*, 2 PROSPECTUS 285, 289 (1969)).

<sup>139</sup> *Id.* at 1.

<sup>140</sup> Wheeler, *The “Thurmond Rule” and Other Advice and Consent Myths*, *supra* note 122.

<sup>141</sup> Kar & Mazzone, *supra* note 125, at 91.

<sup>142</sup> PALMER, *supra* note 37 (see “Summary”).

The scholars cited above, in analyzing the Garland nomination, argue that departure from longstanding tradition “generates a category of constitutional risk” and that “[l]ongstanding practices can . . . guide constitutional interpretation, particularly on issues relating to the scope of power of the elected branches of government.”<sup>143</sup> They rely in part on the *Noel Canning* case, which explains that “long settled and established practice is a consideration of great weight” when interpreting “constitutional provisions regulating the relationship between Congress and the President.”<sup>144</sup> The problem with this constitutional hook is that, as discussed above, *nothing* about the Thurmond Rule is “long settled.” The parties affected by the unwritten rule do not agree on its origins, its name, its function, or even its existence. This makes the prospect of judicial intervention vanishingly small.

A further problem facing potential litigation is standing. While federal courts might be able to consider this type of constitutional question with the right hook, the party seeking to invoke jurisdiction would still bear the burden of demonstrating standing to sue.<sup>145</sup> Constitutional challenges must establish an “injury in fact” rather than an abstract or hypothetical harm.<sup>146</sup> Challenges to the appointments process often fail to meet this requirement when brought by citizens.<sup>147</sup> Even challenges to the appointments process by members of the Senate may fail on this ground where the litigant-senator lacks an injury in the form of diminished legislative effectiveness.<sup>148</sup>

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<sup>143</sup> Kar & Mazzone, *supra* note 141, at 89–90.

<sup>144</sup> *Id.*; Nat'l Lab. Rel. Bd. v. Noel Canning, 573 U.S. 513, 524 (2014) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

<sup>145</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

<sup>146</sup> *Id.* at 560.

<sup>147</sup> *See, e.g., Ex parte Levitt*, 302 U.S. 633, 633-34 (1937) (per curiam) (dismissing a challenge to the appointment of Justice Black for lack of standing); *Cogswell v. U.S. Senate*, No. 08-cv-01929-REB-MEH, 2009 WL 529243, at \*8 (D. Colo. Mar. 2, 2009), *aff'd* 353 F. App'x 175, 176 (10th Cir. 2009) (dismissing a generalized grievance against the Senate for the delay in two district court confirmations).

<sup>148</sup> *See McClure v. Carter*, 513 F. Supp. 265, 270 (D. Idaho), *aff'd sub nom. McClure v. Reagan*, 454 U.S. 1025 (1981) (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)) (“The touchstone [to standing] is whether the legislator’s interest in ‘maintaining the effectiveness of (his) votes’ is sufficient to confer standing to challenge an action impairing that effectiveness.”). In *McClure*, the Idaho District Court stated that “[t]o allow members of Congress to change hats, as it were, to plead the unconstitutionality of their own acts before this court on the basis of an argument already debated in the Senate but lost there by vote, would . . . set a dangerous precedent.” *Id.* at 271. This suggests that, at the very least, a Senator cannot demonstrate standing to challenge a *confirmed*

At least two suits were brought regarding the use of the Thurmond Rule against the Garland nomination, but those suits (brought by individual citizens) were both dismissed for lack of standing and neither reached consideration on the merits.<sup>149</sup> A later suit seeking to enjoin the replacement of Justice Ginsburg (and to install Judge Garland in the vacancy) was also dismissed for lack of standing because it expressed no “particularized” injury.<sup>150</sup> It is unclear what type of particularized injury a citizen—or, indeed, a senator—would have to show to reach the merits in such a case.

Finally, the courts cannot simply decide on the “proper” method of conduct in the appointments process. The judiciary’s “role to play” in the determination of Congressional rules is limited to evaluating whether the rules are “constitutionally infirm” or could be “manipulated beyond reason.”<sup>151</sup> A federal court will not decide lawsuits that ask it to impose judicially-formulated rules of conduct on the legislative branch in a vacuum.<sup>152</sup> The result is that if the courts cannot address the Thurmond Rule or senatorial courtesy through the lens of an “express constraint,” they are unlikely to address the unwritten rules at all.

### B. Codification

Codification of the Thurmond Rule or senatorial courtesy would not solve problems associated with the substance of the rules, but would rectify the many issues that derive from their unwritten nature. Codification refers here specifically to the creation of a new Standing Rule of the Senate, rather than the more easily achievable (and more easily reversible) introduction of a committee policy or use of a procedural workaround, either of which might temporarily accomplish the same goal. Codification of this sort could concretely answer the four questions discussed above, and remove much of

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nominee, although it is unclear how this would apply to a nominee who did not receive confirmation proceedings.

<sup>149</sup> *Michel v. McConnell*, 217 F. Supp. 3d 269, 270 (D.D.C. Nov. 17, 2016), *aff'd* 664 F. App'x 10 (D.C. Cir. 2016); *Kimberlin v. McConnell*, No. GJH-16-1211, 2016 WL 8667769 (D. Md. June 3, 2016), *aff'd* 671 F. App'x 128 (4th Cir. 2016).

<sup>150</sup> *Silas v. Trump*, No. CV 20-8674-JFW(AGRx), 2020 WL 6054913, at \*3 (C.D. Cal. Oct. 9, 2020).

<sup>151</sup> *Michel v. Anderson*, 817 F. Supp. 126, 138–40 (D.C. Cir. 1993).

<sup>152</sup> *See United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981) (declining to “develop rules of behavior for the Legislative Branch” without a “discernable legal standard or . . . a congressional policy determination”).

the unpredictability and partisan capriciousness that accompanies the unwritten rules.

The codification of Senate rules has been advocated for since the early days of the republic, when John Adams' "inconsistent and subjective manner while presiding" led Thomas Jefferson to call for the Senate's governance "by 'some known system of rules [so] that [the presiding officer] may neither leave himself free to indulge caprice or passion, nor open to the imputation of them.'" <sup>153</sup> Former Senate Parliamentarian Floyd Riddick was an advocate of codification, and noted that he hoped to someday "tak[e] all of the body of [Senate precedent] and put[] it in the rules."<sup>154</sup>

Codification of previously unwritten or informal Senate rules is not unprecedented. Senate Rule XIX, for example, was added to entrench the Senate's policy of respectfulness among its members. Although Jefferson's Manual of Parliamentary Practice long implored senators to remain civil during debate, no formal rule about civility was installed until 1902, when a provision was added to Rule XIX in the wake of a fistfight between the two senators from South Carolina.<sup>155</sup> Rule XIX's new provision prohibited any senator from imputing to another sitting senator "by any form of words" conduct unbecoming of the office.<sup>156</sup> This rule is still on the Senate books, and has been enforced as recently as 2017.<sup>157</sup>

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<sup>153</sup> Michael A. Macchiarola, *Constitution Over Comity: Toward Ensuring that the Senate's Advice and Consent Power Does Not "Take a Seat" to the Opportunistic Use of Senate Rules*, 58 SANTA CLARA L. REV. 295, 305 (2018) (quoting THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES 5 (2d ed. 1812)).

<sup>154</sup> Interview by Donald A. Ritchie with Floyd M. Riddick, *supra* note 5.

<sup>155</sup> THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES § XVII (1801); see Louis Jacobson, *Did Elizabeth Warren Break the Rules? Plus 5 Other Questions About Rule 19*, POLITIFACT (Feb. 8, 2017), <https://www.politifact.com/article/2017/feb/08/did-elizabeth-warren-break-rules-plus-5-other-ques/> [<https://perma.cc/HDE3-LZHH>] (explaining the history of the rule).

<sup>156</sup> S. Res. 285, 113th Cong. Rule XIX (2013) (enacted).

<sup>157</sup> This rule was invoked most recently against Senator Elizabeth Warren when she spoke out against the nomination of then-Senator Jeff Sessions for Attorney General. Paul Kane & Ed O'Keefe, *Republicans Vote to Rebuke Elizabeth Warren, Saying She Impugned Sessions's Character*, WASH. POST (Feb. 8, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/02/07/republicans-vote-to-rebuke-elizabeth-warren-for-impugning-sessions-character/> [<https://perma.cc/ALV8-HL2A>]. The motives for its enactment and its exercise aside, the fact that this provision existed as a formal rule rather than an informal one allowed the presiding officer to silence Senator Warren via procedural vote, rather than creating several rounds of debate as an unwritten rule might. Whether or not this outcome is normatively desirable, the rule was procedurally effective.

The central hurdle to codification is the Senate rulemaking process. Technically, amendments to the Standing Rules require only a simple majority.<sup>158</sup> Practically, though, a proposed rule would have to *reach* a vote in the Senate, which would require a cloture motion. A cloture motion on rulemaking requires the approval of two-thirds of Senators “present and voting,” a much more demanding threshold.<sup>159</sup> The bottom line is that codification would require a substantial coalition within the senate—as many as 67 senators, depending on attendance. This is not impossible to achieve, but it means that any proposed Rule would have to be highly agreeable to both parties. This makes codification difficult, but demonstrates its merits as well—the process of hammering out a compromise proposal could result in a clearer and less malleable rule.

In regard to senatorial courtesy, one perspective holds that “[g]reater standardization in the process, . . . along with procedural changes to bring senatorial courtesy more in line with constitutional design[,] is both possible and desirable.”<sup>160</sup> This view advocates for codification because reforms from outside the Senate exhibit a “complete lack of any effective enforcement mechanism . . . because the [reformer] lacks authority to change procedural rules of the Senate.”<sup>161</sup> Codification could formalize senators’ authority over district court appointments, resolve the question of circuit courts, and remove Supreme Court nominations from the ambit of senatorial courtesy entirely.<sup>162</sup>

Indeed, codification would allow the Senate to declare that senatorial courtesy exists, to say whether it is mandatory on the Senate (or whether blue-slip policy is mandatory on the Judiciary Chair), and to define which senators may raise the objection on which nominations, and how. This would answer the four practical questions and—by eliminating a senator’s ability to deviate from the rule—potentially diminish the political consequences as well. While there might be partisan opposition to the *terms* of the codification, the long-standing nature of the rule decreases the likelihood of opposition to its formalization in general.

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<sup>158</sup> WALTER J. OLESZEK, CONG. RSCH. SERV., R44395, AMENDING SENATE RULES AT THE START OF A NEW CONGRESS, 1953-1975: AN ANALYSIS WITH AN AFTERWORD TO 2015 5 (2016).

<sup>159</sup> *Id.*

<sup>160</sup> Sharp, *supra* note 30, at 774.

<sup>161</sup> *Id.* at 779.

<sup>162</sup> *Id.*

A similar solution has been proposed for the Thurmond Rule. Codification of the Thurmond Rule “as a formal chamber stipulation” might rectify the Rule’s problems by laying out “relevant parameters that Democrats and Republicans do not ‘redefine’ over succeeding presidential election years.”<sup>163</sup> Codification would require a clear definition of the Thurmond Rule, obvious and undisputed deadlines, and specification of the particular vacancies to which the Rule applies.<sup>164</sup> It seems, however, that given the consistent back-and-forth regarding the very *existence* of the Thurmond Rule, it may be more difficult to find the necessary coalition to codify the Rule at all, regardless of terms. If the parties cannot agree to the rule’s existence, it will be impossible to set it down in written form.

### C. Abrogation

The third possible solution is abrogation. Abrogation would solve the problems of unwritten rules by declaring once and for all that the rule cannot be enforced, and thus imposing a duty on the Senate to act on nominations in the absence of some other impediment. This solution would eliminate the practical issues of unwritten rules at the first question, by declaring that the alleged rule does not exist. Abrogation would mitigate the political consequences of the unwritten rules by forcing deviation by all senators, in which case the impetus for sanctions would be totally removed because all ability to comply has been removed. Abrogation, however, would require a total renunciation by both parties of the power to exercise these rules, and given the effect of majority power on the exercise, it is unlikely that a majority party would be willing to lend abrogation the necessary support.

Abrogation is less likely for senatorial courtesy than for the Thurmond Rule, because senatorial courtesy is such a longstanding and stable custom. For the Thurmond Rule, abrogation has been advocated as a solution that “duly honors constitutional phrasing and respects voters’ choices . . . by permitting the chief executive to nominate and senators to carefully advise and consent . . . across the full terms of the President and senators.”<sup>165</sup> Even in proposing this solution, however, the advocates recognize its difficulties. The central difficulty arises from “a Senate majority [that] will probably

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<sup>163</sup> Tobias, *supra* note 26, at 2008.

<sup>164</sup> *Id.* at 2009.

<sup>165</sup> *Id.* at 2007.

oppose this initiative,” considering it “a unilateral disarmament” or an unrealistic, draconian measure.<sup>166</sup>

It is not just Senate opposition that would make abrogation difficult, either. The abrogation would be readily skirted and almost impossible to enforce. While an abrogation would prevent the majority from halting confirmations on the basis of the time remaining in a president’s term, there are numerous other avenues available if a party wished to circumvent that abrogation. The majority could simply draw out the advice and consent process over the final year to such an extent that the result is a minimal number of successful appointments. They could simply reject each nominee upon consideration. Or, assuming that senatorial courtesy remains in some form, the majority could withhold blue-slips or discover “personally obnoxious” attributes of the nominees who are considered.

The enforcement of this abrogation would be nigh on impossible. The majority is unlikely to penalize its own members for adhering to the abrogated rule. Given the reluctance of courts to adjudicate the rules of the Senate, much less dictate them, it would be difficult to have a challenge taken up for judicial review. Even if such a challenge was considered, the courts might be reluctant to make a ruling that would effectively result in the confirmation or rejection of an appointee. The sum of these impediments is that abrogation is not necessarily a realistic solution, even if the political obstacles could be avoided.

### CONCLUSION

This essay has addressed the history, effects, and desirability of unwritten rules in the appointments process, as well as potential avenues for reform. Senatorial courtesy and the Thurmond Rule both have the potential for substantial effect on the Senate’s conduct in advice and consent. Senatorial courtesy may serve as a cudgel to defeat specific nominations, while encouraging consultation with home-state senators by the executive. The Thurmond Rule, when applied, totally prevents confirmation after a certain stage in an election year.

The unwritten nature of these rules makes them susceptible to significant political and practical consequences, not unlike those seen with baseball’s

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<sup>166</sup> *Id.* at 2008.

unwritten rulebook. Politically, deviation from the unwritten rules of judicial appointments won't be punished with a pitch to the head, but may be met either by retaliatory obstruction or retaliation-in-kind once the balance of power has shifted. Practically, the unwritten rules raise questions of existence, enforcement, scope, and prerequisite conditions, the answer to any of which may prevent the exercise of the rule—or prevent the confirmation of a judge or justice. These effects are undesirable, as they result in unchecked partisan manipulation and unpredictable enforcement.

In order to remedy the effects of the unwritten rules, the Senate should look to codification. While a judicial solution would benefit from *stare decisis*, it is exceedingly unlikely that any case regarding senatorial courtesy or the Thurmond Rule would be meaningfully adjudicated by a federal court. Additionally, while abrogation could resolve the political and practical issues of unwritten appointments procedures, abrogation itself is impractical and unlikely to succeed. Codification, on the other hand, would allow the parties to level the playing field and agree on the terms of the appointments process. In essence, the ultimate solution to the problem of unwritten rules is simply to write them.