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Judging Biden

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JUDGING BIDEN

John P. Collins, Jr.*

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INTRODUCTION

It would have been easy for President Joe Biden to approach judicial appointments (and, particularly, circuit court appointments) the same way as the Administration he served as Vice President. Like President Obama, President Biden inherited a country in turmoil. A deadly pandemic had killed nearly 400,000 Americans.¹ Necessary quarantine orders shuttered schools and businesses, and ground the economy to a halt.² Partisan tensions were still raging, culminating in the violent storming of the Capitol by right-wing

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insurrectionists. People needed the vaccine, economic relief, and a return to some semblance of normalcy. Also, like President Obama (and thanks to President Trump), President Biden inherited relatively few judicial vacancies—only forty-six, the fewest since President George H.W. Bush inherited thirty-seven in 1989. So, like President Obama, you could understand if President Biden felt the need to focus his efforts elsewhere. But after watching President Trump appoint young, deeply conservative appellate judges and justices for four years, the Biden Administration realized it could not repeat the same well-meaning mistakes Democratic administrations had been making for decades. Instead, it has recognized that—at least for the time being—it has an opportunity to make an impact on the federal judiciary and seems poised to do what it can to maximize it.

The Biden White House is focused on the federal appellate courts in a way prior Democratic administrations were not. A longtime member of the Senate Judiciary Committee, President Biden knows a thing or two about judicial nominees. He has compiled a veteran supporting cast that takes judges as seriously as he does. Together, they are drawing on successful strategies from both parties to leave a distinct imprint on the judiciary. Like those of other Democratic administrations, President Biden’s circuit judges are diverse. Demographically, most are women of color, encompassing members of the Black, Hispanic, and Asian American and Pacific Islander (AAPI) communities. But they are also diverse professionally, including former public

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4. Judicial Vacancies During the Biden Administration, BALLOTpedia, https://ballotpedia.org/judicial_vacancies_during_the_Biden_administration [https://perma.cc/CQ85-HYP9].


7. Previous Committee Chairmen, U.S. SENATE COMM. ON THE JUDICIARY, https://www.judiciary.senate.gov/about/chairman/previous [https://perma.cc/3ECE-4WZQ] [hereinafter Previous Committee Chairmen].


9. Id.

10. Id.

defenders, labor-side litigators, and civil rights advocates. Like those of Republican administrations, many of President Biden’s circuit court nominees are young: with an average age under fifty, they can serve for decades and represent a deep bench from which to fill future Supreme Court vacancies. And they are coming quickly. With a precarious Senate majority and limited opportunities ahead, President Biden and his allies in the Senate are confirming appellate judges at a breakneck pace.

I. HITTING THE GROUND RUNNING

President Biden is no stranger to the judicial confirmation process. As a senator, he served on the Senate Judiciary Committee for over fifteen years and chaired it for nearly nine. And now in the White House, he has made it clear that rebalancing the Judiciary is one of his Administration’s top priorities. He chose Ron Klain, who worked on nominations with President Biden when he was in the Senate, to be his Chief of Staff. He also chose Dana Remus as his top legal advisor in the White House Counsel’s office, and she set the tone early. In December 2020, Remus sent a letter to Democratic senators asking for diverse candidates—not just in terms of race or gender, but professional experience—for open district court seats. President Biden has supported Remus in the White House Counsel’s office with those like Paige Herwig, a deputy counsel to the activist group Demand Justice and a former member of the Obama Administration who worked on judicial nominations.


15. Previous Committee Chairmen, supra note 7.

16. See, e.g., Carlisle, supra note 8 (“The White House senior leadership definitely understands that federal judicial nominations are a priority.”).


19. Id.

20. See Press Release, Demand Justice, Demand Justice Praises Biden Selection of Judicial
The Biden Administration knows it must work fast. In the Senate, Democrats have the slimmest majority. And whether because of age or the impending midterm elections, it is a fragile one, too. But with virtually all constraints removed—no filibuster, no blue slip vetoes—a bare majority is all that is needed to get nominees confirmed. It does not hurt that, like President Trump, President Biden has willing partners in the Capitol. Both Majority Leader Chuck Schumer and Judiciary Chairman Dick Durbin pledged to “do [their] best to fill every vacancy with a qualified person.” For his part, Durbin has kept the nominees moving through committee without being held up by blue slips—a historical courtesy ignored by Republican Chairmen Chuck Grassley and Lindsey Graham—and Schumer has taken up nominees “swiftly and routinely” for floor votes.

A. A BETTER PROCESS

The Biden White House has learned from its predecessors’ successes and failures and has heeded those lessons in its judicial selection strategy. Like prior Republican administrations, it is selecting nominees who are experienced yet underrepresented on the federal appellate bench. And together, the Biden Administration is nominating and confirming judges faster than any other Democratic president since John F. Kennedy.

In the Biden White House, the focus on judges starts at the top—and that alone is a major shift from prior Democratic administrations. It should come
as no surprise. President Biden knows about judicial nominees, having chaired the Senate Judiciary Committee for many years. His Chief of Staff, Ron Klain, is no stranger either—he oversaw judicial nominations during the Clinton Administration.

To head his White House Counsel’s office, President Biden chose Dana Remus. At first glance, it may have seemed like a curious choice. After all, Remus began her legal career as a law clerk to one of the Supreme Court’s most conservative members: Justice Samuel Alito. But Remus was no stranger to Democratic politics. She previously served as the White House’s top ethics lawyer during the Obama Administration and as general counsel to the Obama Foundation. Most recently, she served as the Biden campaign’s general counsel. She also came recommended by former Obama counsel, Bob Bauer. Bauer was one of the first in the Obama White House to push the Administration to nominate younger judges capable of serving longer terms.

In Remus, President Biden has struck a balance. President Obama’s first counsel, Gregory Craig, put judicial nominations on the back burner, focusing instead on the Administration’s early legislative priorities. Remus, too, will have more on her plate than filling judicial vacancies as the Administration attempts to advance its ambitious legislative agenda. But like Don McGahn, who engineered the judicial confirmation machine under President Trump, Remus has the vision and personnel in place to ensure that President Biden leaves a lasting legacy on the bench.

So far, Remus has run a tighter ship than prior Democratic administrations, especially early on. To start, she wasted no time making the Administration’s

31. *Previous Committee Chairmen, supra note 7.*
32. Marimow & Viser, supra note 17.
34. See id.
36. See Shear, supra note 33.
37. See id.
38. See id. (“Ms. Remus was brought into Mr. Biden’s orbit by Bob Bauer, a veteran Democratic lawyer who served as chief counsel for Mr. Obama and has been a legal fixture for Democratic presidents and candidates for decades.”).
41. See Shear, supra note 33 (explaining that Remus “will be a key part” of the Administration’s legislative efforts).
judicial priorities known. In December 2020, she sent a letter to Democratic senators asking them to recommend “individuals whose legal experiences have been historically underrepresented on the federal bench, including those who are public defenders” and “civil rights and legal aid attorneys.” Emphasizing the speed with which the administration hoped to fill vacancies, Remus also asked that Senators submit candidates “within 45 days of any new vacancy being announced.” The Administration also announced early on that it would not wait for the American Bar Association to vet candidates before their nomination. This historical practice, which slowed down the nomination process and has been largely obviated by the internet, had been scrapped by Presidents George W. Bush and Trump, but was followed by President Obama.

Next, to ensure they hit the ground running, her office started proactively soliciting nominees for current and known future vacancies—including before the inauguration. Once identified, candidates were quickly interviewed and nominated—many immediately after their final interviews with Remus and President Biden. For example, all three nominees in President Biden’s second round of nominations on May 12, 2021—Eunice Lee, Veronica Rossman, and Gustavo Gelpi—interviewed with President Biden and Remus on May 10 or 11. Indeed, President Biden personally interviewed nearly all of his early picks.

43. See Bendery, supra note 18. Remus’s letter spoke only of district court nominees, but the Administration’s early circuit court nominees suggest that its vision was not so limited. See Carlisle, supra note 8. (“All three of [President Biden’s] circuit court nominees are Black women, two of whom have served as federal public defenders.”).

44. Bendery, supra note 18 (emphasis omitted).


46. See id.

47. See, e.g., S. COMM. ON THE JUDICIARY, 117TH CONG., QUESTIONNAIRE FOR JUDICIAL NOMINEES 31 (Candace Jackson-Akiwumi, 2021), https://www.judiciary.senate.gov/imo/media/doc/Jackson-Akiwumi%20Senate%20Judiciary%20Questionnaire1.pdf (hereinafter Jackson-Akiwumi) (“On January 11, 2021, officials from the incoming White House Counsel’s Office contacted me and . . . inquired whether I was interested in being considered for nomination to the United States Court of Appeals for the Seventh Circuit.”).

48. See, e.g., S. COMM. ON THE JUDICIARY, 117TH CONG., QUESTIONNAIRE FOR JUDICIAL NOMINEES 43 (Tiffany Cunningham, 2021), https://www.judiciary.senate.gov/imo/media/doc/Cunningham%20Senate%20Judiciary%20Questionnaire.pdf (hereinafter Cunningham) (“On January 11, 2021, officials from the incoming White House Counsel’s Office contacted me and . . . inquired whether I was interested in being considered for nomination to the United States Court of Appeals for the Seventh Circuit.”).

circuit court nominees, although that trend has since abated. That is an unusual practice for non-Supreme Court candidates. However, given both President Biden’s campaign pledge to nominate a Black woman to the Supreme Court, and the fact that four of his first six circuit court nominees were Black women, it made sense that he would get a head start getting to know them.

The White House has also continued the practice of relying on recommendations from home-state senators for nominees for vacancies in their states—at least when the home-state senators are Democrats. For example, New York Senator Chuck Schumer recommended Second Circuit nominees Eunice Lee, Myrna Pérez, and Alison Nathan, and California Senators Dianne Feinstein and Alex Padilla recommended Ninth Circuit nominees Lucy Koh, Holly Thomas, and Gabriel Sanchez. With Republican senators, however, it may—and should—be a different story.

By way of background, during the Obama Administration, Senate Republicans sent a letter to the White House before a single nomination was made demanding that they play a role in selecting the nominees for seats in their states. The Obama Administration obliged, the recommendations never came, and Republicans effectively blocked the Administration from seating judges in Texas, Kentucky, and Alabama (among other “Red” states). When the shoe was on the other foot during the Trump Administration, Judiciary Chairman

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50. See, e.g., Jackson-Akiwumi, supra note 47, at 31; Cunningham, supra note 48, at 43.
57. See Letter from the Cong. Black Caucus to Chuck Grassley, Chairman, Comm. on the Judiciary (Nov. 16, 2017) (noting that Republican senators demanded of President Obama that “the [Senate Judiciary] Committee’s practice of observing senatorial courtesy” be “observed, even-handedly and regardless of party affiliation”).
Chuck Grassley reportedly pushed the White House to consult Democratic home-state senators on nominees, requiring that White House Counsel Don McGahn show him “consultation logs—a ticktock of every communication the White House Counsel’s Office has with home-state senators about judicial nominations.” But consultation with is not acquiescence to, and many of the Democratic senators consulted had little, if any, influence over the final nominee selected.

Home-state senators no longer hold the veto power over nominees—for, say, lack of consultation—that they once did. There is a longer, more complicated history here, but it’s enough to know that Republican Senate Judiciary Chairman Chuck Grassley announced in November 2017 that he would “not allow home-state senators to abuse [the blue slip] courtesy by attempting to block committee proceedings” by withholding blue slips. Current Judiciary Committee Chairman Dick Durbin has said that he will follow suit and not permit Republican senators to use blue slips to single-handedly scuttle an appellate court nomination.

In his first year, President Biden made only one nomination to a circuit court seat in a state with Republican senators. In November 2021, he nominated Memphis lawyer Andre Mathis to a Tennessee-based seat on the Sixth Circuit. Tennessee’s Republican Senators, Marsha Blackburn (who is also a member of the Judiciary Committee) and Bill Hagerty, objected, saying in a statement that although they “attempted to work in good faith with the White House” to find a nominee, the Administration “simply informed [them] of its choice.” The White House, for its part, said it had consulted with Blackburn and Hagerty and would continue to consult with home-state senators “on both sides of the aisle . . . in good faith.”

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60. See Letter from Ron Wyden and Jeffrey A. Merkley, U.S. Sens., to Donald F. McGahn, White House Couns. (Sept. 7, 2017), http://static.politico.com/59/2a/f5b886e44d6ba505b1551125a32e/wh-judicial-vacancy-signed.pdf [https://perma.cc/ZR8K-NREF] (asserting that McGahn was “only interested in our input if we were willing to preapprove [his] preferred nominee”).


62. See Carlisle, supra note 8 (“Now in power himself, Durbin has announced he also doesn’t plan to honor blue slips for circuit court nominations.”).


65. Id.
Whatever the level of consultation—substantive or otherwise—there are signs that the White House made an effort to find a nominee Republicans could support. Like many Republican appointees—and unlike many of President Biden’s other first-year nominees—Mathis has spent his career in private practice as a corporate defense attorney. He also mirrors prototypical Republican judicial candidates in another way (although this one is probably less appealing when applied to a Democratic nominee): Mathis is young. At age forty at the time of nomination, Mathis is one of the Administration’s youngest nominees to date.

Mathis aside, the Administration has vacancies to fill in other states with Republican senators like Kansas, Louisiana, South Carolina, Indiana, Ohio, and Texas. Although the White House may continue to engage these senators, there is nothing to suggest that the senators will go along in good faith. Most Republican senators seem dead set on voting against all Biden nominees on principle—including nearly all of the Republican senators from these states. South Carolina Senator Lindsey Graham is a notable exception, as he has voted for five of the eleven circuit judges confirmed in President Biden’s first year (he voted no on four and did not participate in the votes for the other two). With a South Carolina-based Fourth Circuit seat currently vacant, Graham may have earned himself some influence over who gets—or does not get—the nomination.

Spurning Republicans entirely—especially Graham—does come with some risks. Because the Senate is evenly divided, there are an equal number of Democrats and Republicans on the Judiciary Committee. If Republicans on the Committee start voting in lockstep against every nominee—so far, it has happened only twice for circuit court nominees—then the ties must be broken.

66. See Press Release, Tenth Round, supra note 63. That said, Mathis has also “represented numerous indigent criminal defendants through his work as a member of the Criminal Justice Act Panel for the Western District of Tennessee and his pro bono litigation with the Tennessee Innocent Project.” Id.


69. See Jordan Carney, Graham Emerges as Go-To Ally for Biden’s Judicial Picks, HILL (Nov. 26, 2021, 10:58 AM), https://thehill.com/homenews/senate/583111-graham-emerges-as-go-to-ally-for-bidens-judicial-picks [https://perma.cc/9Y32-K35X] (noting that Thomas Jipping, a senior legal fellow at the Heritage Foundation, said that “[m]ost of the Republican conference is voting against most of Biden’s nominees.”).


71. See Current Judicial Vacancies, supra note 68.


73. James Arkin, Senate Judiciary Committee Deadlocks on 9th Cir. Pick, LAW360 (Oct. 21, 2021, 11:12 AM), https://www.law360.com/employment-authority/articles/1433074/senate-
by discharge motion and up to four hours of debate on the Senate floor before the nominee can be placed on the Executive Calendar and considered for an up-or-down vote. As with everything in the Senate, that can take up valuable floor time and slow the pace of confirmations (and other Senate business). It’s a hurdle, but not an insurmountable one.

B. Sending a Stronger Signal

On March 30, 2021, President Biden announced his first three circuit court nominees. It was a historic package in many respects. All three nominees were Black women, exceeding by one the number of Black women appointed to circuit court vacancies during the eight-year Obama Administration. Two were former federal public defenders, matching the number currently serving. And one, when confirmed, became the first Black judge ever to serve on their court. Weeks later, he announced three more. Three more federal public defenders and two more women. And since then, President Biden has nominated a career voting rights advocate, a labor-side organizer and attorney, an academic and former law clerk to Justice Ruth Bader Ginsburg, an openly gay state supreme court justice, and a state family court judge, among others.


80. Id.

These early nomination packages may not represent much of a confirmation strategy—these days, that boils down to controlling both the White House and the Senate and little more. But they are not without strategic purpose, either. Rather, these nominations are sending two important signals. To the public, they signal that unlike his Democratic predecessors President Biden is taking judicial nominations seriously. And to those aspiring to join the bench, they signal that a diverse judiciary requires professional diversity, too.

There is one signal, however, that is not being sent—at least not yet: a preferred jurisprudential vision. Selecting nominees associated with a particular viewpoint is one of the most effective ways to promote it and help it gain more widespread acceptance. Republicans have done it for decades—and did it openly during the Trump Administration. “Originalism” and “textualism”—that is how Don McGahn “summed up” the Trump administration’s judicial “vision” in a 2017 speech to Federalist Society members. It is no wonder, then, that President Trump appointed fourteen former law clerks to Justices (and noted originalists) Clarence Thomas and Antonin Scalia to the federal bench. Most recently, he elevated former Scalia clerk Amy Coney Barrett to the Supreme Court in September 2020. During her confirmation hearings, then-Judge Barrett had no problem telling senators that she is an originalist—meaning that she understands the Constitution “to have the meaning that it had at the time people ratified it,” and that its meaning “doesn’t change over time.”


82. David Fontana, Cooperative Judicial Nominations During the Obama Administration, 2017 Wis. L. Rev. 305, 315 (2017) (“Judicial nominations also play an important role in promoting the jurisprudential vision.”).


86. JULIA TAYLOR, CONG. RSN. SERV., LSB10539, JUDGE AMY CONEY BARRETT: SELECTED PRIMARY MATERIAL 1 (2020).

Democratic administrations continue to avoid this practice. President Biden’s nominees, in particular, have so far taken pains to disavow any particular interpretive view. Eunice Lee said that she “do[es] not have an overarching view as to how the provisions of the Constitution should be interpreted.” Veronica Rossman said she “do[es] not ascribe to any single jurisprudential vision.” Even Gustavo Gelpi—after serving as a federal magistrate and district judge for twenty years—said he “do[es] not ascribe to any school of jurisprudence and legal theory.

The problems with this approach are two-fold. First, it makes Democratic nominees sound evasive and gives Republican senators cover to vote against them. At the joint hearing for Lee and Rossman, Louisiana Senator John Kennedy complained that he could not vote for the nominees if he did not know their judicial philosophy. Second, the failure to articulate a competing jurisprudential vision further legitimizes the only other one being offered.

C. A RAPID PACE

James Ho’s confirmation in December 2017 was historic for both the nominee and the President who nominated him. Judge Ho became the first AAPI judge to serve on the Fifth Circuit. And President Trump set the record for circuit court nominations sound evasive and gives Republican senators cover to vote against them. At the joint hearing for Lee and Rossman, Louisiana Senator John Kennedy complained that he could not vote for the nominees if he did not know their judicial philosophy. Second, the failure to articulate a competing jurisprudential vision further legitimizes the only other one being offered.

QFRs.pdf [https://perma.cc/9GZ6-UNVM] (“I would interpret the Constitution with reference to its text, history, and structure. The basic insight of originalism is that the Constitution is a law and should be interpreted like one.”).

88. For a deeper discussion on the value of naming a particular jurisprudential vision, see Fontana, supra note 82, at 312–27 (“For lower court nominations, the nomination by a president of a candidate affiliated with that name and the affiliated jurisprudential vision signals to the legal community that the president is serious about promoting that vision.”).


93. See Hearing on Pending Nominations Before the S. Judiciary Comm., 117th Cong., at 1:48:28 (June 9, 2021), https://www.judiciary.senate.gov/meetings/06/02/2021/nominations [https://perma.cc/7VGC-EYFR]. When Lee responded that she did not have a “personal judicial interpretation philosophy,” Kennedy interrupted to proclaim (incredulously) that “[y]ou’re going to be on the United States Court of Appeals....and you don’t have a judicial philosophy about how the United States Constitution should be interpreted?” Id.

confirmations in a president’s first year at twelve, matching the combined number confirmed in the first years of the Obama, Bush, and Clinton Administrations.95

The Biden Administration is proceeding with similar speed. Overall, President Biden put forth twelve slates of judicial nominations, nine of which included circuit judge nominees.96 Drawing on the successful strategies of prior Republican presidents, he often announced them in groups—nominating two or three at a time.97 In the Senate, Judiciary Chairman Dick Durbin did his part to keep the flow of nominations moving.98 Like Republican Chairmen Chuck Grassley and Lindsey Graham, Durbin scheduled two circuit court nominees to appear as co-panelists at a hearing four times, including doing so for the first time ever with a nominee to the D.C. Circuit.99 And Majority Leader Chuck Schumer managed to keep floor votes coming while also balancing major legislative goals and potential government shutdowns.100 The result: Eleven circuit judges confirmed before Christmas (and forty judges confirmed overall), with two more set up for votes in early January 2022.101

As impressive as that is, the Administration still has work to do to build on that success in its second year. The Trump Administration nominated six more circuit judges in late 2017, setting up a slate of confirmations in Spring 2018.102 That is part of the reason why President Trump was able to appoint eighteen circuit judges—an increase of 50%—in his second year.103 The Biden Administration has the opportunity to do the same. The Senate has already confirmed both of the two holdover nominees to the Ninth Circuit.104 In addition,
there are twenty-two current and known future vacancies to fill and seven nominees as of early February 2022.\textsuperscript{105} Helpfully, some of these vacancies are for seats in states with at least one Democratic senator, and several have been public for months.\textsuperscript{106} With the prospect of both confirming a new Supreme Court justice in the spring and losing Senate control in the midterm elections in the fall, there is no time to waste filling every last seat.\textsuperscript{107}

II. BY THE NUMBERS

A. AGE\textsuperscript{108}

President Biden’s first-year circuit judge appointees suggest that Democrats are finally taking age more seriously—though still not quite as seriously as Republicans. Republicans have long understood that younger appointees can hold their seats for longer terms, which allows them to decide more cases and prevents future administrations from “flipping” them.\textsuperscript{109} And, younger judges can help build a viable farm team for future administrations to fill Supreme Court vacancies.\textsuperscript{110} By choosing younger nominees—those nominated in 2021 had an average age of just over forty-eight—President Biden is ensuring that the seats he fills stay filled and that future Democratic administrations have an experienced but youthful pool of potential Supreme Court picks.\textsuperscript{111}

It has only been one year, but President Biden is on pace to appoint the youngest cohort of circuit judges by a Democratic administration in modern history. At 49 years old, the average age of his first-year appointees is seven years younger than the first eleven circuit judges confirmed during the Obama

\begin{itemize}
\item \textsuperscript{106} See Judicial Vacancy Tracker, supra note 105; Megan Mineiro, Biden Judicial Nomination Train Heading for Purple and Red States, ROLL CALL (Jan. 10, 2022, 5:00 AM), https://www.rollcall.com/2022/01/10/biden-judicial-nomination-train-heading-for-purple-and-red-state-stops/ [https://perma.cc/CML7-UQ3K].
\item \textsuperscript{108} In general, I collected age information from the Federal Judicial Center and Senate Judiciary Committee questionnaires. When I could not find an exact birth date, I used September 1 as a placeholder. See Abigail Abrams, This is the Most Common Birthday, TIME (Sept. 8, 2017, 9:05 AM), https://time.com/4933041/most-popular-common-birthday-september/ [https://perma.cc/9JVN-SE6N] (explaining that “Birth data shows that . . . September is the busiest month for births overall”).
\item \textsuperscript{110} Id.
\item \textsuperscript{111} See Voruganti, supra note 13.
\end{itemize}
Administration (56.6).112 Even President Trump—for whom youth was a top priority—started off slightly slower: the average age of the twelve circuit judges confirmed in President Trump’s first year was just under fifty.113 And with only three appointees with experience as Article III judges, most of President Biden’s appointees will be poised to hold their seats for decades.114 The youngest—Judge Candace Jackson-Akiwumi—was approximately forty-one at the time of her confirmation, and will not be eligible to go senior until she turns sixty-five in 2044.115 Notably, Judge Jackson-Akiwumi is younger than all but two of the circuit judges confirmed during the Obama Administration at the time of their confirmation.116

That said, the Administration—like prior Democratic administrations—seems to have an age floor and is unwilling to nominate anyone in their thirties.117 President Obama nominated only one during his eight years—thirty-nine-year-old Goodwin Liu—and withdrew that nomination after Republicans balked.118 President Trump, by contrast, appointed eight in his one term.119 That difference is representative of the trend over the last forty years. Starting with President Reagan, Republicans have appointed the twenty-five youngest circuit judges—eighteen of which were in their thirties when nominated.120

President Biden has also already given himself several competitive candidates to replace retiring Justice Stephen Breyer on the Supreme Court. Judge Ketanji Brown Jackson remains a top contender for the seat. She is only fifty-one years old to replace retiring Justice Stephen Breyer on the Supreme Court. Judge Ketanji Brown Jackson remains a top contender for the seat. She is only fifty—one years old—to close to the average age of President Trump’s three Supreme Court appointees—and one of Justice Breyer’s former law clerks.121 She was also

112. See id.; McMillion, supra note 95, at 10; Judges Eligible for Senior Status Spreadsheet (Feb. 8, 2022) (on file with author); Obama Judges Spreadsheet (Feb. 8, 2022) (on file with author).
113. McMillion, supra note 95, at 10.
117. For more on the importance of youth in judicial nominations, see Schwartzman & Fontana, supra note 109 (“Younger federal judges have more time to build a jurisprudence” and to network in order to “share and amplify their legal views.”).
120. See Schwartzman & Fontana, supra note 109.
reportedly considered by the Obama Administration for Justice Scalia’s seat back in 2016, and that was before she was elevated to the D.C. Circuit. The White House is also reportedly considering several other Black women either appointed or nominated by President Biden to the Courts of Appeals: Judge J. Michelle Childs, nominated to the D.C. Circuit, Judge Tiffany Cunningham of the Federal Circuit, Judge Eunice Lee of the Second Circuit, Arianna Freeman, nominated to the Third Circuit, Judge Candance Jackson-Akiwumi of the Seventh Circuit, Judge Holly Thomas of the Ninth Circuit, and Nancy Abudu, nominated to the Eleventh Circuit—nearly all of whom are in their forties. Should President Biden get a second vacancy, Judges Myrna Pérez and Jennifer Sung would bring youth and diversity (demographic and professional) to One First Street.

B. DIVERSITY

Following four years of overwhelmingly white, male nominees from President Trump, President Biden has made a concerted effort to rebalance diversity on the federal courts of appeals. From gender, to race and ethnicity, to professional pedigree, the Biden Administration is on pace to appoint the most diverse group of federal judges in history.

The Administration wasted no time in trying to rebalance gender diversity on the courts of appeals. Nine of the Administration’s eleven first-year appointees were women, nearly matching in one year the eleven appointed during the entire Trump Presidency. And, for the most part, they are replacing male colleagues, because nine of the eleven vacancies were created by male judges. Judge Jackson’s confirmation was historic for that reason: With her, the D.C. Circuit became the first federal appeals court with an active majority of women judges. All told, gender diversity on the courts of appeals increased this year

124. See generally Carlisle, supra note 8.
125. See Federal Judges Nominated by Joe Biden, supra note 96; Federal Judges Nominated by Donald Trump, supra note 102.
127. See The Democracy and Government Reform Team, Examining the Demographic Compositions of U.S. Circuit and District Courts, CTR. FOR AM. PROGRESS (Feb. 13, 2020), https://www.americanprogress.org/article/examining-demographic-compositions-u-s-circuit-district-courts/ [https://perma.cc/47IV-9CFG] (showing that the number of active judges sitting on the D.C. circuit was 45.5% in February 2020 and that women took the majority with the addition of Judges Neomi Rao and Jackson, which made the split six women to five men); Judges, U.S. CT. OF APPEALS D.C. CIR., https://www.cadc.uscourts.gov/internet/home.nsf/content/judges
by a net of seven.\textsuperscript{128}

That trend, however, is likely to level off going forward. More than 42% of active circuit judges currently eligible to retire (22 of 52) are women, meaning they will likely represent a greater share of future retirements.\textsuperscript{129} This is already bearing out, as 36% of those women eligible (8 of 22) have announced their intent to retire sometime in the future.\textsuperscript{130} Inevitably, some will be replaced by men—like Judge Bernice Bouie Donald, who will be replaced by Andre Mathis, and Judge Kathleen O’Malley, who will be replaced by Judge Leonard Stark.\textsuperscript{131}

President Biden is making equally great strides in resetting racial and ethnic diversity. He saw five Black circuit judges confirmed before February 2022 and has nominated five more, putting him on pace to likely exceed in two years the nine appointed by both Presidents Clinton and Obama during each of their respective two-term presidencies.\textsuperscript{132} As all five appointees were women, President Biden has already exceeded the number of Black women appointed by any other president, ever.\textsuperscript{133} And these appointees are not merely maintaining diversity that already existed—to the contrary, all five were confirmed to seats formerly occupied by white men. In another historic confirmation, Judge Cunningham became the first Black judge appointed to the Federal Circuit.\textsuperscript{134} This marks a dramatic 180-degree turn from President Trump, who became the first president since President Nixon to not appoint a single Black circuit judge.\textsuperscript{135}

President Biden’s other appointees likewise represent historically underrepresented groups. Judge Gelpí is only the second Puerto Rican to serve on the First Circuit (which covers most of New England and Puerto Rico).\textsuperscript{136}

\textsuperscript{128} Confirmation Listing, supra note 126.
\textsuperscript{129} See Judges Eligible for Senior Status Spreadsheet, supra note 112.
\textsuperscript{130} See id.
\textsuperscript{133} See Jennifer Bendery, Joe Biden Has Appointed More Black Women to U.S. Appeals Courts Than Nearly Any President, HUFFPOST (July 20, 2021, 2:47 PM), https://www.huffpost.com/entry/joe-biden-black-women-federal-courts_n_60f700b9e4b097f2b2387a489 (noting that President Biden had tied President Clinton with three Black women appointed as circuit judges; with five now appointed, Biden has broken that tie).
\textsuperscript{134} Id.
\textsuperscript{135} Id., supra note 132, at 37.
Judge Myrna Pérez became the fourth Hispanic to serve on the Second Circuit, and the first Hispanic woman since Justice Sonia Sotomayor. Judge Jennifer Sung is the first AAPI circuit judge from Oregon, and Judge Lucy Koh is the first Korean-American woman circuit judge. And Judge Beth Robinson is the first openly LGBTQ woman to serve on any federal court of appeals.

The President has opportunities to make further inroads. Nancy Abudu, when confirmed to the Eleventh Circuit, will be the court’s first Black woman judge. There are also vacancies to fill on the First, Second, Fourth, Fifth, Sixth, and Tenth Circuits. Many of these courts have never had a judge of Hispanic descent (e.g., the Sixth Circuit) or a judge of AAPI heritage (e.g., the First, Fourth, and Tenth Circuits). And the Fifth Circuit—despite covering states with significant Latino and Black populations—has never had a Latina or Black woman judge.

President Biden’s most lasting legacy may be the professional diversity of his nominees. Breaking from his predecessors, Democratic and Republican alike, President Biden has followed through on his commitment to appoint those whose professional experiences have been historically underrepresented on the federal bench.

The most notable group so far is public defenders. In his first year alone, President Biden appointed five current or former federal public defenders. Those appointees more than doubled the total serving on the federal appellate bench. The other side in those federal criminal cases—prosecutors—are already well-represented on the bench. Nearly half of President Obama’s and over two-thirds of President Trump’s confirmed nominees had prosecutorial experience. On the Second Circuit, for example, five of the court’s current

141. Judicial Vacancy Tracker, supra note 105.
143. See The Democracy and Government Reform Team, supra note 127.
144. ALL. FOR JUST., supra note 53, at 26.
145. Id.
146. See id. at 32.
active judges are former prosecutors. Judge Lee is the only judge with public defender experience.

Biden also tapped labor-side and civil rights attorneys—two other severely underrepresented backgrounds. He nominated Jennifer Sung, a former union organizer who decided disputes between labor unions and public employers for the Oregon Employee Relations Board, to a seat on the Ninth Circuit. And he nominated Myrna Pérez, “director of the Brennan Center’s Voting Rights and Elections Program at the New York University (NYU) School of law,” and Beth Robinson, who as a lawyer advocated for gay and lesbian rights, to seats on the Second Circuit.

But, there is at least one underrepresented professional class of lawyers missing from the Administration’s nominees to date: plaintiffs’ lawyers (and, particularly those who represent plaintiffs in class action lawsuits). For example, the two circuits that have had the most vacancies—the New York-based Second Circuit and the California-based Ninth Circuit—hear significantly more class action cases than the other circuits. Yet, none of the seven appointees to those courts in 2021 have any plaintiff-side commercial litigation experience. To the extent other members of those benches have experience with class actions in practice, it is largely as corporate defense attorneys who would have fought against class certification in class actions against their corporate clients. As a result, this complex and evolving area of law is being developed by those whose experience is largely one-sided.

Mirroring more so past Republican administrations, President Biden did not draw heavily from federal district courts for circuit nominees in his first year. Only three of his appointees—Judges Jackson, Gelpí, and Koh—have federal judicial experience serving as district court judges. That is a marked departure

149. Id.; see also Press Release, Third Slate, supra note 79.
151. Press Release, Fourth Slate, supra note 81; Press Release, Sixth Round, supra note 139; Treisman, supra note 81.
152. See Securities Class Action Clearinghouse: A Collaboration with Cornerstone Research, Filings Database, Filings by Circuit, STAN. L. SCH., https://securities.stanford.edu/circuits.html [https://perma.cc/RSM6-8J7X] (data showing that the Second and Ninth Circuits hear more securities class actions than all other circuits combined); Class Action Lawsuit Database, CLASSACTIONS.ORG, https://www.classaction.org/database [https://perma.cc/8KTF-CMQ2] (identifying New York and California as the states in which the most class actions are filed).
from the Obama Administration, which filled more than a third of its vacancies with lower federal court judges, especially early on.\textsuperscript{156}

But that strategy may be shifting. Four of his seven nominees carrying over into year two—Judges Stark, Nathan, Childs, and Davis—are district judges appointed by President Obama.\textsuperscript{157} President Trump successfully elevated four of his own district court appointees after (very) brief stints on the district court.\textsuperscript{158} This group included two of President Trump’s youngest circuit judges, Andrew Brasher and Justin Walker.\textsuperscript{159} In both cases, their service as district judges enhanced their resumes for circuit seats and helped offset concerns raised by their ages.\textsuperscript{160} President Biden has appointed Lauren King, Sarala Vidya Nagala, Margaret Strickland, and Jia Cobb—all in their late-30s to early-40s—to district court seats in Washington State, Connecticut, New Mexico, and Washington, D.C., where several circuit judges are either retiring or currently eligible to retire.\textsuperscript{161} This corps of new district judges includes more former public defenders, a longtime federal prosecutor, and a member of the Muscogee Nation who, if elevated, would become the first Native American circuit judge.\textsuperscript{162}

Some old habits die hard, and many of President Biden’s first-year appointees have the traditional (and limiting) elite credentials rewarded by past administrations. Eighty-two percent (9 of 11) went to a “Top 14” law school.\textsuperscript{163} If you include Judge Rossman’s time as a Ninth Circuit staff attorney, nearly three-quarters (8 of 11) clerked on a federal court of appeals.\textsuperscript{164} Only two, however, have clerked on the Supreme Court.\textsuperscript{165} By contrast, nearly 40% (21 of 54) of President Trump’s circuit court appointees clerked on the Supreme Court.\textsuperscript{166} See Russell Wheeler, Judicial Nominations in the Bush and Obama Administrations’ First Nine Months, BROOKINGS (Oct. 23, 2009), https://www.brookings.edu/research/judicial-nominations-in-the-bush-and-obama-administrations-first-nine-months/ [https://perma.cc/UP9L-UQNV].

\begin{footnotes}
\item[157] See Federal Judges Nominated by Donald Trump, supra note 102.
\item[158] See id.
\item[159] See id.
\item[160] See, e.g., Letter from William C. Hubbard, Chair, ABA Standing Comm. on the Fed. Judiciary, to Lindsey Graham, Chairman, & Dianne Feinstein, Ranking Member, U.S. Senate, Comm. on the Judiciary on (May 5, 2020), http://cdn.cnn.com/cnn/2020/images/05/05/2020.05.05.letter.graham.feinstein.justin.reed.walker.nomination.pdf [https://perma.cc/73UZ-6Z13] (rating Walker “Well Qualified” for the D.C. Circuit after rating him “Not Qualified” for the district court and explaining that Walker’s service “as a district judge”—even for just a few months—“offset concerns about his years of practicing law”).
\item[161] See Federal Judges Nominated by Joe Biden, supra note 96.
\item[163] See Federal Judges Nominated by Joe Biden, supra note 96 (Each judge’s information can be accessed by clicking on the name.); See Biden Judges (Feb. 8, 2022) (on file with author).
\item[164] See id.
\item[165] See id.
\end{footnotes}
In terms of picking judges, President Biden may be the president Democrats have been waiting for. He has moved quickly, and appointed in his first few months more circuit judges than President Obama appointed in his entire first year. His judges are also younger and more diverse than past administrations (particularly when it comes to professional experience). If you are a Democrat, there is good reason to be very happy with the way things are going.

The question—and potential problem—is how long it can keep going and how much these efforts can offset the substantial gains made by Republicans. Thanks to an evenly-divided Senate and former Majority Leader Mitch McConnell’s pledge to “leave no vacancy behind,” the Biden Administration is fighting against limited time and limited opportunity.

Consider, for example, the number of vacancies the Administration could theoretically fill over the next three years. In addition to the eleven seats filled in 2021 (and two Ninth Circuit seats filled in January 2022), there are seventy additional circuit judges who either have retired, are currently eligible to retire, or will be eligible to retire by mid-2024 (when, potentially, the Senate will stop confirming judges in the lead-up to the presidential election). No one expects anywhere near that number to retire over the next four years. Rather, it is more realistic to expect some subset of the thirty-five judges who were appointed by Democrats to retire. It certainly will not be all, as many of that group have been eligible to retire for more than a decade (including during the entirety of the Obama Administration) but have chosen not to. But as it stands in early February 2022, there are four current and eighteen future court of appeals vacancies.

Opportunities to “flip” seats—that is, appoint a judge to a seat previously held by a Republican appointee—are likely to be few and far between. When he took


170. See supra note 168.

171. See Wheeler, supra note 169 (noting that “23 [of those judges eligible to retire] have been eligible for at least 20 years”); Judges Eligible for Senior Status Spreadsheet, supra note 112.

172. See id.

173. See Judicial Vacancy Tracker, supra note 105
office in January 2021, President Biden inherited only two circuit vacancies previously held by judges appointed by Republicans: Judge Torruella’s seat on the First Circuit and Judge Flaum’s seat on the Seventh Circuit. Since then, only two other Republican appointees—the now-late Judge Peter Hall of the Second Circuit and former Chief Judge D. Brooks Smith of the Third Circuit—have retired. And there are only five other circuit judges appointed by Republicans that will become eligible to retire by mid-2024.

What about all those who are already eligible to retire? At present, there are twenty-six active circuit judges appointed by Republican presidents eligible to retire. But do not look for much movement there, either. For starters, twenty-four of twenty-six could have retired during the Trump Administration, guaranteeing that a Republican appoint their successor. Indeed, six were eligible to retire before or during the George W. Bush Administration. It is far from an exact science, but for my purposes it is compelling evidence that many in this group just are not interested in retiring from active service. And they are still able to do the job after all these years because Republicans have prioritized young nominees for decades.

There are a few reasons that some may choose to retire now, though. Judge Helene White, confirmed to the Sixth Circuit under President George W. Bush, was originally nominated by President Clinton. She informed the White House in November that she would assume senior status when a successor was confirmed.


176. See Judges Eligible for Senior Status Spreadsheet, supra note 112.


179. See Judges Eligible for Senior Status Spreadsheet, supra note 112.


181. See Schwartzman, supra note 118.


Some may no longer feel in step with their contemporary conservative colleagues and prefer a more moderate replacement. Judges Julia Smith Gibbons of the Sixth Circuit and Ilana Rovner of the Seventh Circuit have broken with their courts’ conservative blocs in major cases. Judge Gibbons recently concurred in a decision to dissolve a stay of an OSHA COVID-19 vaccine regulation challenged by conservative groups. She also dissented from a pair of decisions by the Sixth Circuit’s conservatives permitting abortion restrictions to go into effect. Judge Rovner wrote an opinion upholding a nationwide injunction against the Trump Administration’s policies targeting sanctuary cities, joined an opinion blocking Indiana’s parental notification requirement for abortions, and joined her liberal colleagues, Judges Diane Wood and Ann Claire Williams, in dissent from the en banc court’s decision to reverse the grant of a petition for a writ of habeas corpus. And some may finally decide that they have done enough. Judges Gibbons and Rovner have been federal judges for thirty-eight and thirty-seven years, respectively. Seventh Circuit Judge Michael Kanne is the longest-serving Republican appointee and had indicated his intent to retire under President Trump before the nomination of his replacement (and former clerk Tom Fisher) was scuttled by Vice President Mike Pence. Federal Circuit Judge Pauline Newman is ninety-four years old. But there are not likely to be many more, and that looks to be the trend going forward as judges are selected more strategically. Fifty-two percent of President Obama’s circuit judges replaced Republican-appointed judges, but only approximately one-third of President Trump’s circuit judges replaced Democrat-appointed judges. And if President Biden cannot flip seats, he cannot flip circuits, either—President Obama flipped nine and President Trump flipped


186. City of Chi. v. Sessions, 888 F.3d 272, 293 (7th Cir. 2018).
187. Planned Parenthood of Ind. & Ky., Inc. v. Box, 991 F.3d 740, 752 (7th Cir. 2021).
three. So far, President Biden has only flipped one, regaining a narrow 7-6 majority on the Second Circuit. President Biden inherited Democratic majorities in the First, Fourth, Ninth, Tenth, D.C., and Federal Circuits. He may not be able to increase them, but he can at least strengthen them by replacing older Democratic-appointed judges with younger ones, resetting the clock for those seats by up to forty years.

There may be little else in the short-term. With the retirement of Judge Smith on the Third Circuit, the partisan balance will even out at eight a piece. President Biden also has seats to fill (or has filled seats already) on the Republican-dominated Fifth, Sixth, and Eleventh Circuits, but those majorities are solid and safe. There, he should take the longer view and look for nominees who can effectively push back against their conservative colleagues’ views and start laying the groundwork for a more coherent, comprehensive liberal jurisprudential vision. Doing so may not change any panel decisions or rehearing en banc polls anytime soon. But he should remember: these picks are “not for today but for tomorrow.”

CONCLUSION

For better or worse—likely worse—judges have taken on an outsized, quasi-political role in our society. Republicans understand that and have in many ways engineered it that way. For too long, Democrats have ignored that reality and approached judicial nominations—especially consequential and influential appellate court nominations—with their hands tied behind their backs. Until now. President Biden has made it clear from the outset that rebalancing the federal judiciary is a priority for his Administration, and he has backed that up by appointing the most federal circuit court judges in a president’s first year in history. His appointees in his first year illustrate that he has learned from his predecessors’ successes by appointing those who are demographically and professionally diverse, and their failures by moving swiftly to fill vacancies with younger nominees able to serve for decades. Whatever the limited opportunity it has, the Biden Administration has been both willing and able to make the most of it to leave a judicial legacy that will last long after the Administration ends.

196. Id.; Judicial Vacancy Tracker, supra note 105.