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Judging Biden

John P. Collins Jr.
George Washington University Law School

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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

* Visiting Associate Professor, The George Washington University Law School.

1. Will Stone, *As Death Rate Accelerates, U.S. Records 400,000 Lives Lost to the Coronavirus*, NPR (Jan. 19, 2021, 2:49 PM), <https://www.npr.org/sections/health-shots/2021/01/19/957488613/as-death-rate-accelerates-u-s-records-400-000-lives-lost-to-the-coronavirus> [https://perma.cc/Y9LB-CSQY].

2. See Jim Tankersley & Michael Crowley, *Biden Outlines \$1.9 Trillion Spending Package to Combat Virus and Downturn*, N.Y. TIMES, <https://www.nytimes.com/2021/01/14/business/economy/biden-economy.html> [https://perma.cc/LG6R-8R6P] (June 17, 2021).

insurrectionists.³ 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 1989.⁴ 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.⁵ 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.⁶

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.⁷ He has compiled a veteran supporting cast that takes judges as seriously as he does.⁸ Together, they are drawing on successful strategies from both parties to leave a distinct imprint on the judiciary.⁹ Like those of other Democratic administrations, President Biden's circuit judges are diverse.¹⁰ Demographically, most are women of color, encompassing members of the Black, Hispanic, and Asian American and Pacific Islander (AAPI) communities.¹¹ But they are also diverse professionally, including former public

3. Michael Balsamo, Colleen Long & Alanna Durkin Richer, *Seditious Conspiracy: 11 Oath Keepers Charged in Jan. 6 Riot*, AP (Jan. 13, 2022), <https://apnews.com/article/stewart-rhodes-arrested-oath-keepers-jan-6-insurrection-70019e1007132e8df786aaf77215a110>; Ted Barrett, Manu Raju & Peter Nickeas, *US Capitol Secured, 4 Dead After Rioters Stormed the Halls of Congress to Block Biden's Win*, CNN (Jan 7, 2021, 3:33 AM), <https://www.cnn.com/2021/01/06/politics/us-capitol-lockdown/index.html> [<https://perma.cc/AF58-NJTZ>].

4. *Judicial Vacancies During the Biden Administration*, BALLOTPEDIA, https://ballotpedia.org/Judicial_vacancies_during_the_Biden_administration [<https://perma.cc/CQ85-HYF9>].

5. Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES, <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [<https://perma.cc/D7XU-B49B>] (Mar. 16, 2020).

6. See Phil Mattingly, *Biden Set to Surpass Trump in First-Year Judicial Nominees; A Window into a Major Democratic Push*, CNN POL. (Dec. 15, 2021, 9:20 AM), <https://www.cnn.com/2021/12/15/politics/biden-judicial-nominations-trump/index.html> [<https://perma.cc/FTZ8-NHUR>].

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

8. See Madeleine Carlisle, *Inside Joe Biden's Plan to Confirm Diverse Federal Judges*, TIME (May 11, 2021, 5:49 PM), <https://time.com/6047501/joe-biden-federal-judges/> [<https://perma.cc/3X6S-6KTC>].

9. *Id.*

10. *Id.*

11. See Ben Jealous, *Biden's Promise for Diverse Judges and Federal Court Diversity*, PHILA. TRIB. (Oct. 3, 2021), https://www.phillytrib.com/commentary/biden-s-promise-for-diverse-judges-and-federal-court-diversity/article_8aaa41dc-7eac-5258-b718-b015421807e3.html [<https://perma.cc/8ZDX-NS3E>]; Aebra Coe, *How Biden Is Reshaping the Federal Bench's Demographics*, LAW360 (Oct. 1, 2021, 3:57 PM),

defenders, labor-side litigators, and civil rights advocates.¹² 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.¹³ 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.¹⁴

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.¹⁵ And now in the White House, he has made it clear that rebalancing the Judiciary is one of his Administration's top priorities.¹⁶ He chose Ron Klain, who worked on nominations with President Biden when he was in the Senate, to be his Chief of Staff.¹⁷ He also chose Dana Remus as his top legal advisor in the White House Counsel's office, and she set the tone early.¹⁸ 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.¹⁹ 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.²⁰

<https://www.law360.com/pulse/articles/1427056/how-biden-is-reshaping-the-federal-bench-s-demographics>; Adrian Blanco, *Biden Nominated as Many Minority Women to Be Judges in Four Months as Trump Had Confirmed in Four Years*, WASH. POST, <https://www.washingtonpost.com/politics/interactive/2021/biden-judge-diversity/> [<https://perma.cc/HA4J-R3MT>] (June 16, 2021, 6:58 PM).

12. Carlisle, *supra* note 8.

13. See Harsh Voruganti, *Judicial Nominations 2021 — Year in Review*, VETTING ROOM (Dec. 31, 2021), <https://vettingroom.org/2021/12/31/judicial-nominations-2021-year-in-review/> [<https://perma.cc/HY7H-28BK>]; David Lat, *Op-Ed: Biden's Flurry of Nominations Will Bring Generations of Diversity to Federal Courts*, L.A. TIMES (Dec. 22, 2021, 3:00 AM), <https://www.latimes.com/opinion/story/2021-12-22/bidens-judicial-nominations-diversity-federal-courts> [<https://perma.cc/MH9Y-LTB8>].

14. Russell Wheeler, *Biden Is Appointing Judges Faster Than Trump, and Most Everyone Else—For Now*, BROOKINGS (Sept. 2, 2021), <https://www.brookings.edu/blog/fixgov/2021/09/02/biden-is-appointing-judges-faster-than-trump-and-most-everyone-else-for-now/> [<https://perma.cc/KNV4-HZJM>].

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.”).

17. Ann E. Marimow & Matt Viser, *Biden Moves Quickly to Make His Mark on Federal Courts After Trump's Record Judicial Nominations*, WASH. POST (Feb. 3, 2021, 7:00 AM), https://www.washingtonpost.com/local/legal-issues/biden-judge-nominations/2021/02/02/e9932f3a-6189-11eb-9430-e7c77b5b0297_story.html [<https://perma.cc/6CWU-MB9W>].

18. Jennifer Bendery, *Biden's Team Tells Senate Democrats to Send Him Judicial Nominees ASAP*, HUFFPOST, https://www.huffpost.com/entry/joe-biden-courts-progressive-nominees_n_5fecc527c5b6e7974fd18321 (Dec. 30, 2020, 2:47 PM).

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.²¹ And whether because of age or the impending midterm elections, it is a fragile one, too.²² But with virtually all constraints removed—no filibuster, no blue slip vetoes—a bare majority is all that is needed to get nominees confirmed.²³ 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.”²⁴ 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 Graham²⁵—and Schumer has taken up nominees “swiftly and routinely” for floor votes.²⁶

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 taking judges seriously: it has assembled a team of players that share the President’s vision and understand the value of younger nominees.²⁷ Like prior Democratic administrations, it is selecting nominees who are experienced yet underrepresented on the federal appellate bench.²⁸ And together, the Biden Administration is nominating and confirming judges faster than any other Democratic president since John F. Kennedy.²⁹

In the Biden White House, the focus on judges starts at the top—and that alone is a major shift from prior Democratic administrations.³⁰ It should come

Nominations Expert Paige Herwig (Jan. 11, 2021), <https://demandjustice.org/demand-justice-praises-biden-selection-of-judicial-nominations-expert-paige-herwig/> [<https://perma.cc/N7QC-K3H8>].

21. Candice Norwood, *With Senate Split 50-50, Here’s What Democrats Can and Can’t Do*, PBS NEWS HOUR (Jan. 28, 2021, 12:05 PM), <https://www.pbs.org/newshour/politics/with-senate-split-50-50-heres-what-democrats-can-and-cant-do> [<https://perma.cc/NH7Y-BXMJ>].

22. See Simone Pathe, *The 10 Senate Seats Most Likely to Flip in 2022*, CNN POL., <https://www.cnn.com/2021/12/17/politics/senate-race-rankings-december/index.html> [<https://perma.cc/3AQK-TBBJ>] (Dec. 19, 2021, 8:28 PM).

23. Jennifer Bendery, *One Year In, Joe Biden Has Confirmed More Lifetime Judges Than Decades of Presidents*, HUFFPOST (Dec. 21, 2021, 6:00 AM), https://www.huffpost.com/entry/joe-biden-confirmed-judges-diversity_n_61c0aab7e4b0c7d8b892f4ca.

24. Carl Hulse, *Durbin, New Judiciary Chair, Warns Republicans on Blocking Judges*, N.Y. TIMES (Mar. 1, 2021), <https://www.nytimes.com/2021/03/01/us/politics/durbin-senate-judiciary-garland.html> [<https://perma.cc/FG4M-YCP2>].

25. See *id.*

26. Jordain Carney, *Senate to Ramp Up Work on Biden’s Judicial Nominees*, HILL (May 13, 2021, 12:16 PM), <https://thehill.com/homenews/senate/553365-senate-to-ramp-up-work-on-bidens-judicial-nominees> [<https://perma.cc/Q5B5-WKKQ>].

27. Voruganti, *supra* note 13.

28. Carlisle, *supra* note 8.

29. Bendery, *supra* note 23.

30. See Emma Green, *How Democrats Lost the Courts*, ATLANTIC (July 8, 2021), <https://www.theatlantic.com/politics/archive/2021/07/liberal-judges-supreme-court-breyer/619333/> [<https://perma.cc/8QEF-FQE4>] (quoting Special Assistant to the President Paige Herwig, “There is a bone-deep feeling about the importance of the judiciary that comes straight from the top.”).

as no surprise. President Biden knows about judicial nominees, having chaired the Senate Judiciary Committee for many years.³¹ His Chief of Staff, Ron Klain, is no stranger either—he oversaw judicial nominations during the Clinton Administration.³²

To head his White House Counsel’s office, President Biden chose Dana Remus.³³ At first glance, it may have seemed like a curious choice. After all, Remus began her legal career as a law clerk³⁴ to one of the Supreme Court’s most conservative members: Justice Samuel Alito.³⁵ 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.³⁶ Most recently, she served as the Biden campaign’s general counsel.³⁷ She also came recommended by former Obama counsel, Bob Bauer.³⁸ Bauer was one of the first in the Obama White House to push the Administration to nominate younger judges capable of serving longer terms.³⁹

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.⁴⁰ Remus, too, will have more on her plate than filling judicial vacancies as the Administration attempts to advance its ambitious legislative agenda.⁴¹ But like Don McGahn, who engineered the judicial confirmation machine under President Trump,⁴² 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.

33. See Michael D. Shear, *Dana Remus Has Taken an Unlikely Path to the White House Counsel’s Office*, N.Y. TIMES, <https://www.nytimes.com/2020/11/17/us/politics/dana-remus-biden.html> [<https://perma.cc/6Q2K-WXND>] (Jan. 20, 2021).

34. *See id.*

35. *See generally* Brianne J. Gorod, *Sam Alito: The Court’s Most Consistent Conservative*, 126 YALE L.J.F. 362 (2017), https://www.yalelawjournal.org/pdf/GorodforWebsite_kry8ep3n.pdf [<https://perma.cc/MC23-5L8T>].

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.”).

39. See Jeffrey Toobin, *The Obama Brief: The President Considers His Judicial Legacy*, NEW YORKER (Oct. 20, 2014), <https://www.newyorker.com/magazine/2014/10/27/obama-brief> [<https://perma.cc/58HM-HTB2>] (noting that the “predilection for younger nominees was a strategy of Robert Bauer, Obama’s [second] White House counsel, and his successor, Kathryn Ruemmler”).

40. See Marisa M. Kashino, *Obama White House Counsel Gregory Craig: What I’ve Learned*, WASHINGTONIAN (May 23, 2011), <https://www.washingtonian.com/2011/05/23/obama-white-house-counsel-gregory-craig-what-ive-learned/> [<https://perma.cc/LB93-YEJC>].

41. *See Shear*, *supra* note 33 (explaining that Remus “will be a key part” of the Administration’s legislative efforts).

42. Peter Nicholas, *Trump’s Fury at Don McGahn is Misplaced*, ATLANTIC (May 22, 2019), <https://www.theatlantic.com/politics/archive/2019/05/don-mcgahn-helped-trump-remake-federal-courts/589957/> [<https://perma.cc/R7K4-7V2E>].

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.”⁴³ 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.”⁴⁴ The Administration also announced early on that it would not wait for the American Bar Association to vet candidates before their nomination.⁴⁵ 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.⁴⁶

Next, to ensure they hit the ground running, her office started proactively soliciting nominees for current and known future vacancies—including before the inauguration.⁴⁷ Once identified, candidates were quickly interviewed and nominated—many immediately after their final interviews with Remus and President Biden.⁴⁸ For example, all three nominees in President Biden’s second round of nominations on May 12, 2021—Eunice Lee, Veronica Rossman, and Gustavo Gelpí—interviewed with President Biden and Remus on May 10 or 11.⁴⁹ Indeed, President Biden personally interviewed nearly all of his early

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).

45. See Andrew Kragie, *Biden Won’t Wait for ABA to Vet Judicial Picks*, LAW360 (Feb. 3, 2021, 6:30 PM), <https://www.law360.com/articles/1351739/biden-won-t-wait-for-aba-to-vet-judicial-picks>.

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> [https://perma.cc/X99W-TAZX] [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%20SJQ%20Public%20Final%20of%20Groups.pdf> [https://perma.cc/V2HP-2KF8] [hereinafter Cunningham] (“I was first contacted by an official from the White House Counsel’s Office on March 8, 2021, and *the following day* I interviewed with attorneys from the White House Counsel’s Office.”) (emphasis added).

49. See S. COMM. ON THE JUDICIARY, 117TH CONG., QUESTIONNAIRE FOR JUDICIAL NOMINEES 92 (Gustavo Gelpí, 2021), https://ntc-prod-public-pdfs.s3.us-east-2.amazonaws.com/aPdkmriKPHRXkaEQjFwCsT_B6xA.pdf [https://perma.cc/E38C-PT5Y] [hereinafter Gelpí]; S. COMM. ON THE JUDICIARY, 117TH CONG., QUESTIONNAIRE FOR JUDICIAL NOMINEES 27 (Eunice Lee, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Lee%20SJQ%20Public%20Final.pdf> [https://perma.cc/F8Q7-YQVQ]; S. COMM. ON THE JUDICIARY, 117TH CONG., QUESTIONNAIRE FOR JUDICIAL NOMINEES 32 (Veronica Rossman, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Rossman%20SJQ%20Public%20Final.pdf> [https://perma.cc/6BV8-QP2P].

circuit court nominees,⁵⁰ although that trend has since abated.⁵¹ 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,⁵² and the fact that four of his first six circuit court nominees were Black women,⁵³ 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.⁵⁴ For example, New York Senator Chuck Schumer recommended Second Circuit nominees Eunice Lee, Myrna Pérez, and Alison Nathan,⁵⁵ and California Senators Dianne Feinstein and Alex Padilla recommended Ninth Circuit nominees Lucy Koh, Holly Thomas, and Gabriel Sanchez.⁵⁶ 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.⁵⁷ 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).⁵⁸ When the shoe was on the other foot during the Trump Administration, Judiciary Chairman

50. See, e.g., Jackson-Akiwumi, *supra* note 47, at 31; Cunningham, *supra* note 48, at 43.

51. See S. COMM. ON THE JUDICIARY, 117TH CONG., QUESTIONNAIRE FOR JUDICIAL NOMINEES 133–34 (Leonard Stark, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Stark%20SJQ%20Public%20Final%20for%20B ox.pdf> [<https://perma.cc/D93B-3XLA>] (describing Stark’s entire judicial selection process without mention of any interviews with President Biden).

52. See Harper Neidig, *Biden Pledges to Nominate Black Woman to Supreme Court*, HILL (Feb. 25, 2020, 10:21 PM), <https://thehill.com/regulation/court-battles/484656-biden-pledges-to-nominate-black-woman-to-supreme-court> [<https://perma.cc/UD5K-GRRZ>].

53. ALL. FOR JUST., A FAIRER COURT: HOW PRESIDENT BIDEN AND CONGRESS RAISED THE BAR IN 2021, at 12 (Dec. 22, 2021), <https://www.afj.org/wp-content/uploads/2021/12/A-Fairer-Court-How-President-Biden-and-Congress-Raised-the-Bar-in-2021.pdf> [<https://perma.cc/Q36P-GC38>].

54. See, e.g., Nate Raymond, *Schumer Recommends Ghislaine Maxwell’s Judge for 2nd Circuit Seat*, REUTERS (Nov. 16, 2021, 7:53 PM), <https://www.reuters.com/legal/litigation/schumer-recommends-ghislaine-maxwells-judge-2nd-circuit-seat-2021-11-17/> [<https://perma.cc/E4VX-BBGV>].

55. See *id.*; Madison Alder, *Schumer Recommends Voting Rights Lawyers for Federal Bench*, BLOOMBERG L. (June 7, 2021, 5:45 PM), <https://news.bloomberglaw.com/us-law-week/schumer-recommends-voting-rights-lawyers-for-federal-bench> [<https://perma.cc/ZST8-UK5Y>].

56. Press Release, Sen. Dianne Feinstein, Feinstein: Judicial Nominees Highlight Strength, Diversity of California (Sept. 8, 2021), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=0DE4CF3F-C156-4777-875B-A6230F6BC65E> [<https://perma.cc/BJD7-XQFR>]; Press Release, Sen. Alex Padilla, Padilla Urges Confirmation of Diverse Slate of California Federal Judges (Dec. 17, 2021), <https://www.padilla.senate.gov/newsroom/press-releases/padilla-urges-confirmation-of-diverse-slate-of-california-federal-judges/> [<https://perma.cc/5W25-CMNG>].

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, evenhandedly and regardless of party affiliation”).

58. See Elliot Slotnick, Sara Schiavoni & Sheldon Goldman, *Obama’s Judicial Legacy: The Final Chapter*, 5 J.L. & Cts. 363, 370–71 (2017).

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.”⁵⁹ But consultation with is not acquiescence to, and many of the Democratic senators consulted had little, if any, influence over the final nominee selected.⁶⁰

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.⁶¹ 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.⁶²

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.⁶³ 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.”⁶⁴ 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.”⁶⁵

59. Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES MAG. (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html> [<https://perma.cc/K9V6-WGQL>].

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”).

61. Chuck Grassley, *100 Years of the Blue Slip Courtesy*, HILL (Nov. 15, 2017, 2:40 PM), <https://thehill.com/blogs/congress-blog/judicial/360510-100-years-of-the-blue-slip-courtesy> [<https://perma.cc/RZ9Q-NL4S>]. For more on blue slips, see *What is a Blue Slip?*, S. Comm. on the Judiciary, <https://www.judiciary.senate.gov/nominations/blueslip> [<https://perma.cc/CKU6-2HZD>].

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.”).

63. Press Release, White House, Off. of the Press Sec’y, President Biden Names Tenth Round of Judicial Nominations (Nov. 17, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/17/president-biden-names-tenth-round-of-judicial-nominees/> [<https://perma.cc/XA64-96X3>] [hereinafter Press Release, Tenth Round].

64. Madison Alder, *Tennessee Senators Unhappy with Consultation on Judge Pick*, BLOOMBERG L. (Nov. 18, 2021, 5:48 PM), <https://news.bloomberglaw.com/us-law-week/tennessee-senators-decry-lack-of-consultation-on-judge-nominee> [<https://perma.cc/XA3C-LZGG>] (accusing the Biden administration of “disregard[ing] the longstanding tradition of substantively consulting with home-state senators”).

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.⁶⁶ 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.⁶⁷

Mathis aside, the Administration has vacancies to fill in other states with Republican senators like Kansas, Louisiana, South Carolina, Indiana, Ohio, and Texas.⁶⁸ 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.⁶⁹

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).⁷⁰ 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.⁷¹

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.⁷² If Republicans on the Committee start voting in lockstep against every nominee—so far, it has happened only twice for circuit court nominees⁷³—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.*

67. Harsh Voruganti, *Andre Mathis — Nominee to the U.S. Court of Appeals for the Sixth Circuit*, VETTING ROOM (Jan. 10, 2022), <https://vettingroom.org/2022/01/10/andre-mathis/> [<https://perma.cc/S96V-8CYB>]; see questionnaires cited *supra* notes 47–51.

68. *Current Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> [<https://perma.cc/D9KV-477Y>]; see Madison Alder, *Biden’s Judicial Nominations to Get Trickier in Second Year*, BLOOMBERG L. (Jan. 3, 2022, 3:45 AM), <https://news.bloomberglaw.com/us-law-week/bidens-judicial-nominations-to-get-trickier-in-second-year> [<https://perma.cc/43H5-52GS>].

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.”).

70. See *id.*; Russell Wheeler, *Biden’s First-year Judicial Appointments—Process*, BROOKINGS (Jan. 26, 2022), <https://www.brookings.edu/blog/fixgov/2022/01/26/bidens-first-year-judicial-appointments-process/> [<https://perma.cc/262D-GAFZ>].

71. See *Current Judicial Vacancies*, *supra* note 68.

72. *Senate Committee on the Judiciary*, GOVTRACK, <https://www.govtrack.us/congress/committees/SSJU#members> [<https://perma.cc/Y6A2-ZBA2>].

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.⁷⁴ 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.⁷⁵ 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.⁷⁶ Two were former federal public defenders, matching the number currently serving.⁷⁷ And one, when confirmed, became the first Black judge ever to serve on their court.⁷⁸ Weeks later, he announced three more.⁷⁹ Three more federal public defenders and two more women.⁸⁰ 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.⁸¹

judiciary-committee-deadlocks-on-9th-circ-pick; see Madison Alder, *Senate Panel Deadlocks on Biden Ninth Circuit, Trial Court Picks*, BLOOMBERG L. (Dec. 2, 2021, 9:33 AM), <https://news.bloomberglaw.com/us-law-week/senate-panel-deadlocks-on-biden-ninth-circuit-trial-court-picks> [https://perma.cc/8U3A-8KME].

74. See ELIZABETH RYBICKI, CONG. RSCH. SERV., RL31980, SENATE CONSIDERATION OF PRESIDENTIAL NOMINATIONS: COMMITTEE AND FLOOR PROCEDURE 6–7 (2021), <https://sgp.fas.org/crs/misc/RL31980.pdf> [https://perma.cc/9Y6D-2DG4]; see also ELIZABETH RYBICKI, CONG. RSCH. SERV., R46769, THE SENATE POWERSHARING AGREEMENT 4–5 (2021), <https://sgp.fas.org/crs/misc/R46769.pdf> [https://perma.cc/Q6WE-VFVD].

75. See Press Release, White House, Off. of the Press Sec'y, President Biden Announces Intent to Nominate 11 Judicial Candidates (Mar. 30, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/30/president-biden-announces-intent-to-nominate-11-judicial-candidates/> [https://perma.cc/8AKU-SHBQ] [hereinafter Press Release, 11 Candidates].

76. *Article III African-American Judges by President*, MINORITY CORP. COUNS. ASS'N, <https://www.mcca.com/resources/reports/federal-judiciary/african-american-judges-by-president/> [https://perma.cc/9PYY-ANEB].

77. Maggie Jo Buchanan, *Pipelines to Power: Encouraging Professional Diversity on the Federal Appellate Bench*, CTR. AM. PROGRESS (Aug. 13, 2020), <https://www.americanprogress.org/article/pipelines-power-encouraging-professional-diversity-federal-appellate-bench/> [https://perma.cc/26DV-CZ4T]. Judge Robert Wilkins of the D.C. Circuit, who had worked for the Public Defender Service for the District of Columbia, was not included in this calculation.

78. Jack Rodgers, *Tiffany Cunningham Confirmed by Senate as First Black Federal Circuit Judge*, Courthouse News Serv. (July 19, 2021), <https://www.courthousenews.com/tiffany-cunningham-confirmed-by-senate-as-first-black-federal-circuit-judge/> [https://perma.cc/WQ2P-C3FM].

79. See Press Release, White House, Office of the Press Sec'y, President Biden Announces Third Slate of Judicial Nominees (May 12, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/12/president-biden-announces-third-slate-of-judicial-nominees/> [https://perma.cc/V84C-BPUV] [hereinafter Press Release, Third Slate].

80. *Id.*

81. See Press Release, White House, Off. of the Press Sec'y, President Biden Announces Fourth Slate of Judicial Nominations (June 15, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/15/president-biden-announces-4th-slate-of-judicial-nominations/> [https://perma.cc/F229-4DR2] [hereinafter Press Release, Fourth Slate]; Press

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.⁸² Republicans have done it for decades—and did it openly during the Trump Administration.⁸³ “Originalism” and “textualism”—that is how Don McGahn “summed up” the Trump administration’s judicial “vision” in a 2017 speech to Federalist Society members.⁸⁴ 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.⁸⁵ Most recently, he elevated former Scalia clerk Amy Coney Barrett to the Supreme Court in September 2020.⁸⁶ 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.”⁸⁷

Release, White House, Off. of the Press Sec’y, President Biden Names Fifth Round of Judicial Nominees (June 30, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/30/president-biden-names-fifth-round-of-judicial-nominees/> [<https://perma.cc/9UF5-37F9>] [hereinafter Press Release, Fifth Round]; Rachel Treisman, *Meet Judge Beth Robinson, the First Out Lesbian to Serve on Any Federal Circuit Court*, NPR (Nov. 2, 2021, 1:43 PM), <https://www.npr.org/2021/11/02/1051466337/beth-robinson-first-out-lesbian-judge-federal-circuit-court> [<https://perma.cc/W5KG-XXRG>].

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.”).

83. See *id.* at 318–19 & nn.70–73 (describing how George W. Bush’s nominees promoted originalism); Tom McCarthy, *Trump’s Dark Legacy: A US Judiciary Remade in His Own Image*, GUARDIAN, <https://www.theguardian.com/us-news/2019/dec/25/trump-judiciary-judges-legal-america> [<https://perma.cc/8M4L-ZCYC>] (Jan. 9, 2020, 11:53 AM).

84. *2017 National Lawyers Convention, White House Counsel McGahn*, C-SPAN (Nov. 17, 2017), <https://www.c-span.org/video/?437462-8/2017-national-lawyers-convention-white-house-counsel-mcgahn> [<https://perma.cc/S8TV-RS9C>] [hereinafter McGahn, Address at the Federalist Society].

85. Tony Mauro, *Former SCOTUS Clerks Dominate the Ranks of Trump’s Judicial Nominees*, CONN. L. TRIB. (Nov. 21, 2018, 12:30 PM), <https://www.law.com/nationallawjournal/2018/11/21/former-scotus-clerks-dominate-the-ranks-of-trumps-judicial-nominees/> [<https://perma.cc/9QQK-U54A>].

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

87. Tom McCarthy, *Amy Coney Barrett Is a Constitutional ‘Originalist’ – But What Does It Mean?*, GUARDIAN, <https://www.theguardian.com/us-news/2020/oct/26/amy-coney-barrett-originalist-but-what-does-it-mean> [<https://perma.cc/36TS-4ZF4>] (Oct. 27, 2020, 4:32 AM) (noting Barrett is “the latest conservative judge to declare herself a constitutional ‘originalist’”); see also S. COMM. ON THE JUDICIARY, 115TH CONG., NOMINATION OF AMY CONEY BARRETT TO THE SEVENTH CIRCUIT COURT OF APPEALS, QUESTIONS FOR THE RECORD SUBMITTED SEPTEMBER 13, 2017, at 1 (2017), <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Feinstein%20>

Democratic administrations continue to avoid this practice.⁸⁸ 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.”⁸⁹ Veronica Rossman said she “do[es] not ascribe to any single school of interpretive methodology.”⁹⁰ Even Gustavo Gelpí—after serving as a federal magistrate and district judge for twenty years⁹¹—said he “do[es] not ascribe to any school of jurisprudence and legal theory.”⁹²

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.⁹³ 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.⁹⁴ And President Trump set the record for circuit court

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.”).

89. S. COMM. ON THE JUDICIARY, 117TH CONG., WRITTEN QUESTIONS FOR EUNICE LEE, NOMINEE TO BE UNITED STATES CIRCUIT JUDGE FOR THE SECOND CIRCUIT, JUNE 16, 2021, at 35 (2021), <https://www.judiciary.senate.gov/imo/media/doc/Lee%20Responses%20to%20Senate%20Judiciary.pdf> [https://perma.cc/SZ33-CFL8] (responding to questions from Senator Dick Durbin, Chair of the Senate Judiciary Committee).

90. S. COMM. ON THE JUDICIARY, 117TH CONG., WRITTEN QUESTIONS FOR VERONICA ROSSMAN, NOMINEE TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT, JUNE 16, 2021, at 19 (2021), <https://www.judiciary.senate.gov/imo/media/doc/Rossman%20Responses%20to%20Senate%20Judiciary.pdf> [https://perma.cc/3MNX-5J48] (responding to questions from Senator Dick Durbin, Chair of the Senate Judiciary Committee).

91. Gelpí, *supra* note 49, at 2.

92. S. COMM. ON THE JUDICIARY, 117TH CONG., WRITTEN QUESTIONS FOR JUDGE GUSTAVO GELPI, NOMINEE TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT, JUNE 30, 2021, at 24 (2021), <https://www.judiciary.senate.gov/imo/media/doc/Gelpi%20QFR%20Responses.pdf> [https://perma.cc/D6AY-6YXL] (responding to questions from Senator Dick Durbin, Chair of the Senate Judiciary Committee).

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.*

94. Emma Platoff, *Former Texas Solicitor General James Ho Wins Confirmation for Federal Court*, TEX. TRIB. (Dec. 14, 2017, 1:00 PM), <https://www.texastribune.org/2017/12/14/texas-jim-ho-federal-5th-circuit-court/> [https://perma.cc/FSM8-24HB].

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,

95. *Id.*; see also BARRY J. MCMILLION, CONG. RSCH. SERV., R45189, U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS DURING PRESIDENT TRUMP'S FIRST YEAR IN OFFICE: COMPARATIVE ANALYSIS WITH RECENT PRESIDENTS 6 (May 2, 2018).

96. See *Federal Judges Nominated by Joe Biden*, BALLOTPEdia, https://ballotpedia.org/Federal_judges_nominated_by_Joe_Biden [https://perma.cc/V5R8-GRAL]; Press Release, White House, Off. of the Press Sec'y, President Biden Names Twelfth Round of Judicial Nominations (Dec. 23, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/23/president-biden-names-twelfth-round-of-judicial-nominees/> [https://perma.cc/22HA-VRV8].

97. See *Federal Judges Nominated by Joe Biden*, *supra* note 96.

98. See James Arkin, *Dems Aim to Build on Judge Confirmation Success in 2022*, LAW360 (Jan. 3, 2022, 12:03 PM), <https://www.law360.com/articles/1451014/dems-aim-to-build-on-judge-confirmation-success-in-2022> (“We understand that we’re a heartbeat away from being in the minority. . . So we’re wasting no time to get well-qualified nominees presented to the committee and reported to the floor.”).

99. See, e.g., *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 117th Cong. (Sept. 14, 2021).

100. See, e.g., Ellen Ioanes, *The Senate's Last-Minute Confirmation Push, Explained*, VOX (Dec. 18, 2021, 5:42 PM), <https://www.vox.com/2021/12/18/22843610/senate-confirmation-votes-ambassadors-judges-schumer-cruz-hawley> [https://perma.cc/BAY7-KBUL]; Jacob Pramuk, *Senate Reaches a Deal to Avoid a Government Shutdown*, CNBC (Sept. 30, 2021, 7:50 AM), <https://www.cnn.com/2021/09/29/government-shutdown-schumer-says-senate-may-vote-on-funding-bill.html> [https://perma.cc/QB3Q-VXF4].

101. Arkin, *supra* note 98; *Federal Judges Nominated by Joe Biden*, *supra* note 96.

102. *Federal Judges Nominated by Donald Trump*, BALLOTPEdia, https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump [https://perma.cc/CTJ4-Q8YA].

103. See *id.*

104. *Federal Judges Nominated by Joe Biden*, *supra* note 96.

there are twenty-two current and known future vacancies to fill and seven nominees as of early February 2022.¹⁰⁵ Helpfully, some of these vacancies are for seats in states with at least one Democratic senator, and several have been public for months.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.¹⁰⁷

II. BY THE NUMBERS

A. AGE¹⁰⁸

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.¹⁰⁹ And, younger judges can help build a viable farm team for future administrations to fill Supreme Court vacancies.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.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

105. *Judicial Vacancy Tracker*, ALL. FOR JUST., <https://www.afj.org/our-work/judicial-nominations/tracker/> [<https://perma.cc/JY4F-5WED>] (Jan. 31, 2022). The seven nominees are Leonard Stark to the Federal Circuit, Alison Nathan to the Second Circuit, Arianna Freeman to the Third Circuit, Andre Mathis and Stephanie Dawkins Davis to the Sixth Circuit, Nancy Abudu to the Eleventh Circuit, and Michelle Childs to the D.C. Circuit. *Judicial Nominee Tracker*, ALL. FOR JUST., <https://www.afj.org/our-work/judicial-nominations/nominees/> [<https://perma.cc/2X62-NR6J>] (Feb. 2, 2022).

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>].

107. Arkin, *supra* note 98; Brian Naylor, *Supreme Court Justice Breyer Formally Announces His Retirement*, NPR, <https://www.npr.org/2022/01/27/1076091746/supreme-court-justice-breyer-retire-announce-biden-white-house> [<https://perma.cc/UL4M-QJLW>] (Jan. 28, 2022, 3:36 PM).

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”).

109. Micah Schwartzman & David Fontana, *Trump Picked the Youngest Judges to Sit on the Federal Bench. Your Move, Biden*, WASH. POST (Feb. 16, 2021, 12:33 PM), <https://www.washingtonpost.com/outlook/2021/02/16/court-appointments-age-biden-trump-judges-age/> [<https://perma.cc/74PB-SBA7>].

110. *Id.*

111. See Voruganti, *supra* note 13.

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—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.

114. Press Release, Third Slate, *supra* note 79 (Gelpi had experience as an Article III judge); Press Release, White House, Off. of the Press Sec’y, President Biden Names Seventh Round of Judicial Nominees (Sept. 8, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/08/president-biden-names-seventh-round-of-judicial-nominees/> [<https://perma.cc/74NX-FSX9>] [hereinafter Press Release, Seventh Round] (Lucy Koh served as a U.S. District Judge); Press Release, White House, Office of the Press Sec’y, President Biden Names Tenth Round of Judicial Nominees (Nov. 17, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/17/president-biden-names-tenth-round-of-judicial-nominees/> [<https://perma.cc/Z9HS-MQZ4>] (Alison Nathan served as a U.S. District Judge).

115. Biographical Directory of Federal Judges Entry for Jackson-Akiwumi, Candace Rae, FED. JUD. CTR., <https://www.fjc.gov/history/judges/jackson-akiwumi-candace-rae> [<https://perma.cc/8SEL-JNLT>]; *FAQs: Federal Judges*, U.S. CTS., <https://www.uscourts.gov/faqs-federal-judges> [<https://perma.cc/5DCL-GCX3>].

116. *See* Moiz Syed, *Charting the Long-Term Impact of Trump’s Judicial Appointments*, PROPUBLICA (Oct. 30, 2020), <https://projects.propublica.org/trump-young-judges/> [<https://perma.cc/LB7A-ZZJ5>].

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 up a jurisprudence” and to network in order to “share and amplify their legal views.”).

118. *See* Micah Schwartzman, *Not Getting Any Younger*, SLATE (May 26, 2011, 6:04 PM), <https://slate.com/news-and-politics/2011/05/president-obama-s-penchant-for-older-judges-scuttled-goodwin-liu.html> [<https://perma.cc/9M7M-A8ZR>].

119. Syed, *supra* note 116.

120. *See* Schwartzman & Fontana, *supra* note 109.

121. Biographical Directory of Federal Judges Entry for Jackson, Ketanji Brown, FED. JUD. CTR., <https://www.fjc.gov/history/judges/jackson-ketanji-brown> [<https://perma.cc/T4UW-42X9>].

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.¹²² 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.¹²³ 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.¹²⁴

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.¹²⁵ And, for the most part, they are replacing male colleagues, because nine of the eleven vacancies were created by male judges.¹²⁶ 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.¹²⁷ All told, gender diversity on the courts of appeals increased this year

122. See Julie Hirschfeld Davis, *Three More Judges Said to Be Vetted for Supreme Court*, N.Y. TIMES (Mar. 4, 2016), <https://www.nytimes.com/2016/03/05/us/politics/three-more-judges-said-to-be-vetted-for-supreme-court.html> [<https://perma.cc/XC34-HK8C>].

123. See Melissa Quinn, *Biden Weighing More Than a Dozen Candidates for Supreme Court Vacancy*, CBS NEWS (Jan. 31, 2022, 2:26 PM), <https://www.cbsnews.com/news/supreme-court-biden-candidates/> [<https://perma.cc/M8EN-FWX>]; see also, e.g., Biographical Directory of Federal Judges Entry for Jackson-Akiwumi, Candace Rae, *supra* note 115; Biographical Directory of Federal Judges Entry for Cunningham, Tiffany Patrice, FED. JUD. CTR., <https://www.fjc.gov/history/judges/cunningham-tiffany-patrice> [<https://perma.cc/ZWR5-Z3ZN>]; Biographical Directory of Federal Judges Entry for Thomas, Holly Aiyisha, FED. JUD. CTR., <https://www.fjc.gov/history/judges/thomas-holly-aiyisha> [<https://perma.cc/AY3U-NRCM>].

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.

126. *Confirmation Listing*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/confirmation-listing> [<https://perma.cc/M72X-2L3Y>] (Jan. 31, 2022).

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/47JV-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.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.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.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.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.¹³² As all five appointees were women, President Biden has already exceeded the number of Black women appointed by any other president, ever.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.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.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).¹³⁶

[<https://perma.cc/337B-Z7AP>] (clicking into the entries for Harry Edwards, Laurence Silberman, Douglas Ginsburg, David Sentelle, and A. Raymond Randolph shows that they are all on senior status).

128. *Confirmation Listing*, *supra* note 126.

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

130. *See id.*

131. *Future Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/future-judicial-vacancies> [<https://perma.cc/B6PB-6MDX>] (Jan. 29, 2022).

132. Candice Norwood, *Biden Has Nominated 8 Black Women to Appellate Courts, Laying Groundwork to Fulfill Campaign Promise*, THE 19TH, <https://19thnews.org/2022/01/biden-black-women-appellate-judges/> [<https://perma.cc/62PR-TFEC>] (Jan. 26, 2022); BARRY J. McMILLION, CONG. RSCH. SERV., R45622, JUDICIAL NOMINATION STATISTICS AND ANALYSIS: U.S. CIRCUIT AND DISTRICT COURTS, 1977-2020 37 (May 18, 2021).

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_60f700b9e4b09f2b2387a489 (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).

134. *Id.*

135. McMILLION, *supra* note 132, at 37.

136. Sam Roberts, *Juan Torruella, Groundbreaking U.S. Appeals Judge, Dies at 87*, N.Y. TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/10/28/us/juan-torruella-groundbreaking-us-appeals-judge-dies-at-87.html> [<https://perma.cc/U7QX-W5VX>]; Harsh Voruganti, *Judge Gustavo Gelpí – Nominee to the U.S. Court of Appeals for the First Circuit*, VETTING ROOM, <https://vettingroom.org/2021/06/07/judge-gustavo-gelpi/> [<https://perma.cc/8KD8-RGMD>].

Judge Myrna Pérez became the fourth Hispanic to serve on the Second Circuit, and the first Hispanic woman since Justice Sonia Sotomayor.¹³⁷ Judge Jennifer Sung is the first AAPI circuit judge from Oregon, and Judge Lucy Koh is the first Korean-American woman circuit judge.¹³⁸ And Judge Beth Robinson is the first openly LGBTQ woman to serve on any federal court of appeals.¹³⁹

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.¹⁴⁰ There are also vacancies to fill on the First, Second, Fourth, Fifth, Sixth, and Tenth Circuits.¹⁴¹ 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).¹⁴² And the Fifth Circuit—despite covering states with significant Latino and Black populations—has never had a Latina or Black woman judge.¹⁴³

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.¹⁴⁴ Those appointees more than doubled the total serving on the federal appellate bench.¹⁴⁵ The other side in those federal criminal cases—prosecutors—are already well-represented on the bench.¹⁴⁶ Nearly half of President Obama's and over two-thirds of President Trump's confirmed nominees had prosecutorial experience.¹⁴⁷ On the Second Circuit, for example, five of the court's current

137. *Brennan Center's Myrna Pérez Confirmed to Federal Bench*, BRENNAN CTR. (Oct. 25, 2021), <https://www.brennancenter.org/our-work/research-reports/brennan-centers-myrna-perez-confirmed-federal-bench> [https://perma.cc/A7R2-L8EQ].

138. Press Release, Fifth Round, *supra* note 81; Press Release, Seventh Round, *supra* note 114.

139. Press Release, White House, Off. of the Press Sec'y, President Biden Names Sixth Round of Judicial Nominees (Aug. 5, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/05/president-biden-names-sixth-round-of-judicial-nominees/> [https://perma.cc/GDA7-7VX3] [hereinafter Press Release, Sixth Round].

140. Press Release, White House, Off. of the Press Sec'y, President Biden Names Twelfth Round of Judicial Nominees (Dec. 23, 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/23/president-biden-names-twelfth-round-of-judicial-nominees/> [https://perma.cc/68L7-SJHU].

141. *Judicial Vacancy Tracker*, *supra* note 105.

142. *Judicial Nominations*, ACS, <https://www.acslaw.org/judicial-nominations/> [https://perma.cc/UF5P-82AF] (Jan. 28, 2022) (click "By Circuit"; then select each circuit in the map).

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.

147. Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates#summary-previous-studies> [https://perma.cc/ZH8S-7LAW].

active judges are former prosecutors.¹⁴⁸ Judge Lee is the only judge with public defender experience.¹⁴⁹

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.¹⁵⁰ 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.¹⁵¹

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.¹⁵² Yet, none of the seven appointees to those courts in 2021 have any plaintiff-side commercial litigation experience.¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ That is a marked departure

148. *Second Circuit Judges*, U.S. CT. OF APPEALS FOR THE SECOND CIR., <https://www.ca2.uscourts.gov/judges/judges.html> [<https://perma.cc/CDP9-86T3>] (providing individual profiles for Judges Livingston, Lohier, Sullivan, Bianco, and Nardini who served as prosecutors before joining the bench).

149. *Id.*; see also Press Release, Third Slate, *supra* note 79.

150. Press Release, Fifth Round, *supra* note 81.

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/R5M6-8J7X>] (data showing that the Second and Ninth Circuits hear more securities class actions than all other circuits combined); *Class Action Lawsuit Database*, CLASSACTION.ORG, <https://www.classaction.org/database> [<https://perma.cc/SKT5-CMQ2>] (identifying New York and California as the states in which the most class actions are filed).

153. See Press Release, Seventh Round, *supra* note 114; see also *supra* notes 148–51 and accompanying text; *Myrna Pérez Fact Sheet*, ALL. FOR JUST. (July 12, 2021), <https://www.afj.org/document/myrna-perez-fact-sheet/> [<https://perma.cc/5MLR-RGDK>].

154. For example, both Second Circuit Judge Steven Menashi and Ninth Circuit Judge Michelle Friedland represented pharmaceutical companies in consumer class actions while in private practice. See, e.g., *In re Namenda Indirect Purchaser Antitrust Litig.*, No. 1:15-cv-6549, 2021 WL 2403727 (S.D.N.Y. June 11, 2021) (Menashi); *Fenwick v. Ranbaxy Pharmas., Inc.*, 353 F. Supp. 3d 315 (D.N.J. 2018) (Menashi); *Meijer, Inc. v. Abbott Lab’ys.*, 251 F.R.D. 431 (N.D. Cal. 2008) (Friedland).

155. Press Release, 11 Candidates, *supra* note 75; Press Release, Third Slate, *supra* note 79; Press Release, Seventh Round, *supra* note 114.

from the Obama Administration, which filled more than a third of its vacancies with lower federal court judges, especially early on.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.¹⁵⁷ President Trump successfully elevated four of his own district court appointees after (very) brief stints on the district court.¹⁵⁸ This group included two of President Trump’s youngest circuit judges, Andrew Brasher and Justin Walker.¹⁵⁹ In both cases, their service as district judges enhanced their resumes for circuit seats and helped offset concerns raised by their ages.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.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.¹⁶² Their time as district judges could likewise enhance their confirmability as circuit judges.

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.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.¹⁶⁴ Only two, however, have clerked on the Supreme Court.¹⁶⁵ By contrast, nearly 40% (21 of 54) of President Trump’s circuit court appointees clerked on the Supreme

156. 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].

157. See *Federal Judges Nominated by Barack Obama*, BALLOTPEDIA, https://ballotpedia.org/Federal_judges_nominated_by_Barack_Obama [https://perma.cc/N543-5BJP]; *Federal Judges Nominated by Joe Biden*, *supra* note 96.

158. See *Federal Judges Nominated by Donald Trump*, *supra* note 102.

159. See *id.*

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 (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-6ZJ3] (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”).

161. See *Federal Judges Nominated by Joe Biden*, *supra* note 96.

162. See Jennifer Bendery, *There Are Only 2 Native American Federal Judges. Biden Just Nominated a Third*, HUFFPOST (May 12, 2021, 5:42 PM), https://www.huffpost.com/entry/joe-biden-judicial-nominees-native-american_n_609c2632e4b063dcca4e046 [https://perma.cc/45PE-QPUE].

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).

164. See *id.*

165. See *id.*

Court.¹⁶⁶

III. A NARROW PATH AHEAD

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.¹⁶⁷ 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.¹⁶⁸

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).¹⁶⁹ No one expects anywhere near that number to retire over the next four years.¹⁷⁰ Rather, it is more realistic to expect some subset of the thirty-five judges who were appointed by Democrats to retire.¹⁷¹ 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.¹⁷² But as it stands in early February 2022, there are four current and eighteen future court of appeals vacancies.¹⁷³

Opportunities to “flip” seats—that is, appoint a judge to a seat previously held

166. Ian Millhiser, *What Trump Has Done to the Courts, Explained*, VOX, <https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump-supreme-court-federal-judges> [<https://perma.cc/DDX6-254Z>] (Sept. 29, 2020, 10:32 PM).

167. See *Federal Judges Nominated by Joe Biden*, *supra* note 96; See *Federal Judges Nominated by Barack Obama*, *supra* note 157.

168. Chris Cioffi, *McConnell’s Push to Confirm Judges May Mean Another Tradition is Dead*, ROLL CALL (June 11, 2020, 6:30 AM), <https://rollcall.com/2020/06/11/mcconnells-push-to-confirm-judges-may-mean-another-tradition-is-dead/> [<https://perma.cc/MC54-L7K4>].

169. Jonathan H. Adler, *How Big a Mark Will President Biden Make on the Federal Judiciary?* (Updated), VOLOKH CONSPIRACY (Dec. 19, 2021, 8:19 PM), <https://reason.com/volokh/2021/12/19/how-big-a-mark-will-president-biden-make-on-the-federal-judiciary/> [<https://perma.cc/9R67-ZWA7>]; Russell Wheeler, *Can Biden ‘Rebalance’ the Judiciary?*, BROOKINGS, <https://www.brookings.edu/blog/fixgov/2021/03/18/can-biden-rebalance-the-judiciary/> [<https://perma.cc/ACJ3-AVMR>] (Apr. 22, 2021); Judges Eligible for Senior Status Spreadsheet, *supra* note 112.

170. See Wheeler, *supra* note 169; Judges Eligible for Senior Status Spreadsheet, *supra* note 112.

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

by a Republican appointee—are likely to be few and far between. When he took 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.¹⁷⁴ 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.¹⁷⁵ And there are only five other circuit judges appointed by Republicans that will become eligible to retire by mid-2024.¹⁷⁶

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.¹⁷⁷ 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.¹⁷⁸ Indeed, six were eligible to retire before or during the George W. Bush Administration.¹⁷⁹ 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.¹⁸⁰ And they are still able to do the job after all these years because Republicans have prioritized young nominees for decades.¹⁸¹

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.¹⁸² She informed the White House in November that she would assume senior status when a successor was confirmed.¹⁸³

174. Harsh Voruganti, *What Can We Expect From the Early Batches of Biden Judges*, VETTING ROOM (Feb. 1, 2021), <https://vettingroom.org/2021/02/01/what-can-we-expect-from-the-early-batches-of-biden-judges/> [https://perma.cc/8QYP-GE8P]; Juan Torruella, BALLOTPEDIA, https://ballotpedia.org/Juan_Torruella [https://perma.cc/FX3Q-YNFX]; Joel Flaum, BALLOTPEDIA, https://ballotpedia.org/Joel_Flaum [https://perma.cc/69HH-9KRC].

175. Madison Alder, *Third Circuit Vacancy Gives Biden Chance to Shift Court Balance*, BLOOMBERG (Dec. 7, 2021, 2:05 PM), <https://news.bloomberglaw.com/us-law-week/third-circuit-vacancy-gives-biden-chance-to-shift-court-balance> [https://perma.cc/WM3C-KW2S].

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

177. See Jorge Gomez, *One-Third of Federal Appellate Judges Eligible to Retire Could Create Dozens of Vacancies*, FIRST LIBERTY (Feb. 19, 2021), <https://firstliberty.org/news/one-third-judges-eligible-to-retire/> [https://perma.cc/R2Z9-6MNV].

178. See Carl Hulse, *McConnell Has a Request for Veteran Federal Judges: Please Quit*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/us/politics/mcconnell-judges-republicans.html> [https://perma.cc/L76V-UD3K]; Judges Eligible for Senior Status Spreadsheet, *supra* note 112.

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

180. For a deeper discussion of why some judges find retirement an unattractive option, see Marin K. Levy, Essay, *The Promise of Senior Judges*, 115 NW. U.L. REV. 1227, 1246–49 (2021) (explaining, for example, that senior judges typically cannot participate in en banc rehearings or vote on administrative matters, and may lose their chambers to more junior active judges). See also Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 88–94 (2012).

181. See Schwartzman, *supra* note 118.

182. See Michael Abramowitz, *Ye Shall Be Judged – Not*, WASH. POST (May 5, 2008), <https://www.washingtonpost.com/wp-dyn/content/article/2008/05/04/AR2008050401936.html> [https://perma.cc/8MKN-VTB7].

183. Shams Hirji, *New Sixth Circuit Vacancy Announcements*, SQUIRE PATTON BOGGS: SIXTH

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.¹⁸⁴ She also dissented from a pair of decisions by the Sixth Circuit's conservatives permitting abortion restrictions to go into effect.¹⁸⁵ Judge Rovner wrote an opinion upholding a nationwide injunction against the Trump Administration's policies targeting sanctuary cities,¹⁸⁶ joined an opinion blocking Indiana's parental notification requirement for abortions,¹⁸⁷ 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.¹⁸⁸

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.¹⁸⁹ 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.¹⁹⁰ Federal Circuit Judge Pauline Newman is ninety-four years old.¹⁹¹

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.¹⁹² And if President Biden cannot flip seats, he cannot flip

CIR. APP. BLOG (Dec. 14, 2021), <https://www.sixthcircuitappellateblog.com/judicial-appointments-and-vacancies/new-sixth-circuit-vacancy-announcements/> [<https://perma.cc/298V-3U7X>].

184. *In re MCP No. 165*, 21 F.4th 357, 388 (6th Cir. 2021) (Gibbons, J., concurring).

185. *See* *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 568–69 (6th Cir. 2021) (en banc) (Gibbons, J., dissenting); *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 994 F.3d 774, 775–77 (6th Cir. 2021) (en banc) (Gibbons, J., dissenting).

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).

188. *See* *Dassey v. Dittmann*, 877 F.3d 297, 318–19 (7th Cir. 2017) (en banc) (Wood, C.J., dissenting).

189. *Judge Julia Gibbons Receives 2021 Devitt Award*, U.S. CTS. (Oct. 7, 2021), <https://www.uscourts.gov/news/2021/10/07/judge-julia-gibbons-receives-2021-devitt-award> [<https://perma.cc/WP8S-L4P6>]; *Ilana Rovner*, BALLOTPEDIA, https://ballotpedia.org/Ilana_Rovner [<https://perma.cc/6V82-BCF3>].

190. Eliana Johnson, *Why Pence Spiked a Trump Judge*, POLITICO (July 12, 2019, 5:03 AM), <https://www.politico.com/story/2019/07/12/mike-pence-kanne-judge-trump-1411915> [<https://perma.cc/AHQ6-LSQ5>].

191. Perry Cooper, *Federal Circuit Was Untouched by Trump Judicial Nominations*, BLOOMBERG (Dec. 22, 2020, 4:55 AM), <https://news.bloomberglaw.com/ip-law/federal-circuit-was-untouched-by-trump-judicial-nominations?context=article-related> [<https://perma.cc/MQ3A-X5ZA>].

192. Russell Wheeler, *Judicial Appointments in Trump's First Three Years: Myths and Realities*, BROOKINGS (Jan. 28, 2020), <https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-realities/> [<https://perma.cc/C9A3-8PRM>].

circuits, either— President Obama flipped nine and President Trump flipped three.¹⁹³ So far, President Biden has only flipped one, regaining a narrow 7-6 majority on the Second Circuit.¹⁹⁴ President Biden inherited Democratic majorities in the First, Fourth, Ninth, Tenth, D.C., and Federal Circuits.¹⁹⁵ 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.¹⁹⁶ 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.”¹⁹⁷

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.

193. Michael Grunwald, *Did Obama Win the Judicial Wars?*, POLITICO (Aug. 8, 2016, 5:25 AM), <https://www.politico.com/story/2016/08/obama-courts-judicial-legacy-226741> [<https://perma.cc/4GCC-CSYH>]; Wheeler, *supra* note 192.

194. Nick Niedzwiedek, Tina Sfondeles, Alex Thompson & Max Tani, *Biden Veers into Trump's Judicial Wall*, POLITICO (Jan. 20, 2022, 6:28 PM), <https://www.politico.com/newsletters/west-wing-playbook/2022/01/20/biden-veers-into-trumps-judicial-wall-495797> [<https://perma.cc/Y8BB-3LFZ>].

195. Wheeler, *supra* note 192.

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

197. Morning Edition, *Ruth Bader Ginsburg and Malvina Harlan*, NPR, at 03:52 (May 2, 2002, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=1142685> [<https://perma.cc/9UG6-JLRE>] (“The greatest dissents do become court opinions and gradually over time their views become the dominant view.”).