2021

How Biden Began Building Back Better the Federal Bench

Carl Tobias

How Biden Began Building Back Better the Federal Bench

Carl Tobias*

In October 2020, Democratic presidential nominee Joseph Biden famously expressed regret that the fifty-four accomplished, conservative, and young federal appellate court jurists and the 174 comparatively similar district court judges whom former–Republican President Donald Trump and the recent pair of analogous Grand Old Party Senate majorities in the 115th and 116th Congress appointed had left the courts of appeals and the district courts "out of whack." Lamentable were the numerous detrimental ways in which President Trump and these Republican Senate majorities attempted to undercut the appeals courts and district courts, which actually constitute the tribunals of last resort in practically all cases, because the United States Supreme Court Justices grant certiorari in such a minuscule number of appeals. The nomination and confirmation processes that the Republican White House and upper chamber majorities implemented and the myriad conservative judges whom they approved undermined appellate court and district court diversity in terms of ethnicity, gender, sexual orientation, ideological balance, and experience; the appointments procedures; as well as citizen respect for discharge of the preeminent responsibility to nominate and confirm exceptional jurists, the presidency, the Senate, the judiciary, and the rule of law. Accordingly, President

* Williams Chair in Law, University of Richmond School of Law. I wish to thank Margaret Sanner, Carley Ruival, and Jamie Wood for valuable suggestions, Leslee Stone and Ashley Griffin for excellent processing, *Washington and Lee Law Review* Senior Online Editors Sarah Ashworth and Jordan Miceli for expeditious, careful, and flexible editing and for their sound advice, as well as Russell Williams and the Hunton Andrews Kurth Summer Endowment Research Fund for generous, continuing support. I assume complete responsibility for any errors that remain in this piece.

Biden promised that he would comprehensively rectify those stunning complications.

The initial five superb, experienced prospects whom President Biden officially nominated during the month of April 2021 and the Senate members efficaciously investigated, questioned, and considered during the spring and confirmed throughout June demonstrated that the President and the Democratic chamber majority respected these pledges to strongly counter the deleterious consequences imposed by the judicial appointments which the Republican chief executive and the two GOP Senate majorities orchestrated, to improve the court diversity constituents, and to comprehensively revitalize dynamic "regular order" throughout the nomination and confirmation regimes. Therefore, the complications which Trump as well as the Republican Senate majorities in the 115th and 116th Congress caused and how Biden and the Democratic Senate majority commenced remedying or ameliorating the problems deserve consideration, which this piece undertakes.

The first section of the paper evaluates federal judicial selection throughout the administration of former-President Trump and the tenure of the two Grand Old Party Senate majorities during his term in office. The second portion explores how President Biden and the nascent Democratic Senate majority in the 117th Congress have started rectifying the detrimental consequences of the judicial selection practices that Trump and the Republican Senate majorities deployed. Because the segment detects that the Democratic chief executive and the razor-thin chamber majority have begun implementing nomination and confirmation processes that address the difficulties created by the former Republican President and the Senate majorities in the 115th and 116th Congress, the final part affords suggestions for improving the federal judicial selection process in Biden's presidency, the 117th Senate, and the future.

Table of Contents

INTRODUCTION

In October 2020, presidential candidate Joseph Biden lamented that the fifty-four able, conservative, and young federal court of appeals judges and the 174 comparatively analogous district court jurists whom former Republican President Donald Trump and the two similar Grand Old Party (GOP) Senate majorities in the 115th and 116th Congress confirmed had left the appellate courts and the district courts "out of whack."[1] Remarkable were the numerous deleterious ways in which President Trump and those Republican upper chamber majorities attempted to erode the circuit and district courts, which actually comprise the tribunals of last resort in virtually all cases, because the Supreme Court Justices hear so few. The nomination and confirmation procedures that the GOP White House and chamber majorities effectuated and the myriad conservative jurists whom they appointed undercut lower court diversity in terms of ethnicity, gender, sexual orientation, ideological balance, and experience; the process of selection; and citizen regard for this prominent duty's satisfaction, the presidency, the Senate, and the judiciary.

1. *See, e.g.*, David Goldiner, *'It's Getting Out of Whack': Biden Plans Review on Possible Supreme Court Packing*, N.Y. DAILY NEWS (Oct. 22, 2020, 9:25 AM), https://perma.cc/72N7-EL7C; Annie Linskey, *Biden, Squeezed on the Supreme Court, Promises a Commission to Consider Changes*, WASH. POST (Oct. 22, 2020, 8:50 PM), https://perma.cc/7KJ3-U4BW.

Therefore, Biden pledged that he would thoroughly remedy these striking problems.

The initial five stellar, experienced candidates whom President Biden nominated during the spring of 2021 and the chamber effectively appointed over June[2] respected those promises to sharply counter Trump judicial approvals' detrimental ramifications, to enhance the court diversity parameters, and to comprehensively restore dynamic "regular order" throughout the appointments system. Thus, the difficulties which Trump created and how Biden commenced addressing them merit consideration.

I. TRUMP ADMINISTRATION JUDICIAL SELECTION

The 2020 presidential and Senate elections followed nearly one presidential term in which former-President Trump and both of the Republican chamber majorities approved fifty-plus conservative, accomplished, and young appeals court jurists and 174 comparatively analogous district court judges,[3] mainly by rejecting, changing, or deemphasizing the venerable norms that have long promoted the smooth appointment of very fine, mainstream circuit and district court jurists.[4] For example, President Trump infrequently consulted senators who represented plentiful states that encountered judicial openings, although the lawmakers intrinsically possessed greater familiarity with strong prospects than the chief executive.[5] The Trump White House also decidedly confined American Bar Association (ABA) involvement with federal court selection, even though Presidents in office since the 1950s, except

2. *See* Press Release, White House, Off. of the Press Sec'y, President Biden Announces Intent to Nominate 11 Judicial Candidates (Mar. 30, 2021), https://perma.cc/T9RK-4562; Carl Hulse & Michael Shear, *Biden Names Diverse Nominees for the Federal Bench*, N.Y. TIMES (Mar. 30, 2021), https://perma.cc/S4E8-W884 (last updated June 14, 2021); *see infra* notes 49–50 and accompanying text (providing the cloture and confirmation votes for President Biden's initial five judicial nominees whom the Senate felicitously confirmed).

3. *See Archive of Judicial Vacancies*, U.S. CTS., https://perma.cc/F6HF-8RWH (providing confirmation information for years 2017–2020).

4. *See* Carl Tobias, *Keep the Federal Courts Great*, 100 B.U. L. REV. ONLINE 196, 204–20 (2020).

5. *See id.* at 206–07.

President George W. Bush and Trump, depended substantially on the bar association's methodical examinations and ratings.[6] President Trump concomitantly instituted little effort to identify, scrutinize, nominate, and confirm ethnic minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ) choices; or lawyers who have acquired invaluable, less conventional experience, notably defending many persons accused of crime, although robustly supplementing diversity improves the federal bench.[7]

The GOP chamber practically eliminated the venerable "blue slip" policy—which allowed lawmakers from numerous states that confronted vacant appellate court positions to prevent Senate consideration and confirmation of manifold nominees in President Barack Obama's eight years—without salient reasons for the dramatic alteration.[8] Judiciary Committee hearings lacked rigor, as the GOP Senate majority did not canvass informative ABA evaluations and ratings and encourage robust nominee hearing inquiry or deliberation before voting.[9] These modifications enabled controversial nominees to attain close panel and Senate floor ballots.[10]

---

6. *See* Carl Tobias, *Selecting District Judges in the 116th Senate Lame Duck Session*, YALE J. ON REG.: NOTICE & COMMENT, n.7–8 and accompanying text (Dec. 4, 2020), https://perma.cc/F955-6HFA. *See generally* 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://perma.cc/L93H-FKB6.

7. *See* Tobias, *supra* note 4, at 210–11; *see also* Tierney Sneed, *Inside Democrats' Quest to Nominate Judges Who Break the Ex-Prosecutor Mold*, CNN, https://perma.cc/WG3V-BA8Y (last updated July 30, 2021, 4:15 PM). *See generally* Carl Tobias, *President Donald Trump's War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531 (2019); *infra* notes 12, 31, 35–36, 38–39 and accompanying text.

8. *See* Carl Tobias, *Senator Chuck Grassley and Judicial Confirmations*, 104 IOWA L. REV. ONLINE 31, 54–55 (2019) [hereinafter Tobias, *Senator Chuck Grassley*]; Tobias, *supra* note 6, at n.19–20 and accompanying text.

9. *See* 163 CONG. REC. S8,022 (daily ed. Dec. 14, 2017) (statements of Sens. Feinstein & Leahy); Tobias, *supra* note 4, at 214–15.

10. *See* Carl Tobias, *Filling the Federal District Court Vacancies*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 421, 441 (2020).

II. BIDEN ADMINISTRATION JUDICIAL SELECTION

In the 2020 campaign and since President Biden's election, the President has strongly vowed to completely rectify Trump appointments' deleterious impacts.[11] On March 30, the chief executive announced that he intended to submit the first group of picks: eleven impressive, centrist nominees who reflect the above diversity requisites, which significantly enhance judicial decision-making, constrict ethnic, gender, sexual orientation, and related biases which can undermine fairness, and increase public confidence about courts.[12] The selections encompassed

11. *See* sources cited *supra* note 2; Tobias, *Senator Chuck Grassley*, *supra* note 8 (defining regular order as Senate rules, norms, and customs that the Republican Senate majority repeatedly promised to restore but in fact significantly undermined); Press Release, White House, Off. of the Press Sec'y, Statement by President Joe Biden on First Confirmations of His Judicial Nominees (June 8, 2021), https://perma.cc/66YZ-NYYL.

12. *See* sources cited *supra* note 2; Ann E. Marimow, *Biden Judicial Pick Ketanji Brown Jackson Defends Her Independence in Senate Hearing*, WASH. POST (Apr. 28, 2021, 4:36 PM), https://perma.cc/T4WH-ZQNQ; Avalon Zoppo, *Are Judicial Picks With Defender Pasts Unfairly Criticized?*, NAT'L L.J. (July 16, 2021), https://perma.cc/L9KA-D5FQ; *Hearing on Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (Apr. 28, 2021), https://perma.cc/RR5Y-SZVJ [hereinafter *Hearing on Nominees*] (statement of Dick Durbin, Chair); Lynn Sweet, *Jackson-Akiwumi Would Be Rare Judge Who Was a Public Defender Highlighted at Her Senate Confirmation Hearing*, CHI. SUN-TIMES (Apr. 28, 2021, 8:06 PM), https://perma.cc/U4ME-26BR; *see also* Tobias, *supra* note 4, at 222 (analyzing the benefits of diversity in the federal appellate and district courts); Adrian Blanco, *Biden Nominated as Many Minority Women to be Judges in Four Months as Trump Had Confirmed in Four Years*, WASH. POST (June 14, 2021), https://perma.cc/7LMA-WMVX (last updated June 16, 2021, 6:58 PM).

Biden has carefully and expeditiously supplemented the initial slate of exceptional nominees with six additional packages of similarly outstanding nominees. Press Release, White House, Off. of the Press Sec'y, President Biden Announces Second Slate of Judicial Nominees (Apr. 29, 2021), https://perma.cc/F5K3-42X5; Press Release, White House, Off. of the Press Sec'y, President Biden Announces Third Slate of Judicial Nominees (May 12, 2021), https://perma.cc/39P5-3UT5; Press Release, White House, Off. of the Press Sec'y, President Biden Announces Fourth Slate of Judicial Nominations (June 15, 2021), https://perma.cc/7S9A-X9PJ; Press Release, White House, Off. of the Press Sec'y, President Biden Names Fifth Round of Judicial Nominees (June 30, 2021), https://perma.cc/MS78-KZUD; Press Release, White House, Off. of the Press Sec'y, President Biden Names Sixth Round of Judicial Nominees (Aug. 5, 2021) [hereinafter *Sixth Round of Judicial Nominees*], https://perma.cc/CC4X-A4V8; Press Release, White House, Off. of the Press Sec'y, President Biden Names Seventh Round of Judicial Nominees (Sept. 8,

three Black women for court of appeals vacancies, two of whom had capably represented myriad defendants accused with crimes—although Trump neglected to muster *one* Black circuit nominee—and the initial Muslim Article III nominee.[13] Pertinent here were the five suggestions whom the chamber evaluated first.

In late March, Biden announced that the White House intended to nominate the candidates, even though the process which culminated in the nominations had begun considerably earlier.[14] Over 2020, Biden assembled a judicial selection transition team, which permitted him to comprehensively survey possibilities ahead of the January inauguration. By summer 2020, the team had established cogent appointments procedures, while the staff identified a large number of highly competent potential submissions. After Biden won the election, the official presidential transition process started. Most relevantly, Dana Remus, the White House Counsel Designate, wrote senators a December letter, requesting that politicians who represent states with openings tender very qualified people for nominees who manifest the diversity elements before January 20.[15]

On April 19, Biden formally marshaled nomination of the five remarkable candidates whom the Senate confirmed

---

2021) [hereinafter *Seventh Round of Judicial Nominees*], https://perma.cc/XJ53-AJYP.

13. For Trump's consummate failure to nominate one Black appellate court candidate to any of more than fifty vacancies, see *Hearing on Nominees*, *supra* note 12; Sweet, *supra* note 12.

14. *See* Marimow & Viser, *supra* note 6; Ian Millhiser, *Biden's Fight to De-Trumpify the Courts, Explained*, VOX (July 31, 2021, 8:00 AM), https://perma.cc/5D7L-7GD9; Zoe Tillman, *Trump Transformed the Federal Courts. Here's What Biden Could Do.*, BUZZFEED NEWS (Dec. 17, 2020, 4:26 PM), https://perma.cc/9MU2-25GH.

15. The White House concomitantly accorded senators forty-five days to suggest picks for new vacancies that subsequently arise. *See* Letter from Dana Remus to U.S. Senators (Dec. 22, 2020), https://perma.cc/L5QM-KXMM; *see also* Courtney Rozen & Madison Alder, *Biden Deadline for Judicial Nominees Challenges Senate Democrats*, BLOOMBERG LAW (Apr. 23, 2021, 4:46 AM), https://perma.cc/B7R5-GZJ5; Jennifer Bendery, *Biden's Team Tells Senate Democrats To Send Him Judicial Nominees ASAP*, HUFFPOST (Dec. 30, 2020, 2:47 PM), https://perma.cc/K752-5GS4; Sneed, *supra* note 7.

throughout June.[16] They included two prominent, moderate Black women, United States District Court for the District of Columbia Judge Ketanji Brown Jackson as a U.S. Court of Appeals for the D.C. Circuit nominee, and experienced, well regarded federal court advocate Candace Jackson-Akiwumi as a U.S. Court of Appeals for the Seventh Circuit nominee.[17] President Obama had mustered Jackson's appointment to be a district court jurist in 2013 and contemplated the aspirant for the Supreme Court empty post to which he nominated Merrick Garland.[18] She is an exceptional, broadly respected centrist, who ably clerked for trial level and First Circuit judges, plus Justice Stephen Breyer, practiced with three law firms over several years, and was a highly capable, well regarded Assistant Federal Public Defender from 2007 until 2010.[19] Jackson-Akiwumi professionally clerked for acclaimed trial court and Fourth Circuit jurists, litigated with Skadden, Arps, Slate, Meagher, & Flom for a couple of years, and very

16. *See* Press Release, White House, Off. of the Press Sec'y, Nominations Sent to the Senate (Apr. 19, 2021), https://perma.cc/A6WN-3UYY. For information on the confirmation votes, see 167 CONG. REC. S3,969–71 (daily ed. June 8, 2021) (Julien Neals); 167 CONG. REC. S3,975 (daily ed. June 8, 2021) (Regina Rodriguez); 167 CONG. REC. S4,032 (daily ed. June 10, 2021) (Zahid Quraishi); 167 CONG. REC. S4,511 (daily ed. June 14, 2021) (Ketanji Brown Jackson); 167 CONG. REC. S4,748 (daily ed. June 24, 2021) (Candace Jackson-Akiwumi); Nicholas Fandos, *Senate Confirms First Biden Judges, Beginning Push to Rebalance Courts*, N.Y. TIMES (June 9, 2021), https://perma.cc/L3P7-M89Y; Carl Hulse, *Senate Confirms Top Biden Judge as McConnell Threatens Future Nominees*, N.Y. TIMES (June 14, 2021), https://perma.cc/49XZ-ERR3.

17. *See* Press Release, *supra* note 16; sources cited *supra* note 2; Hulse, *supra* note 16. For President Biden's third and fourth Black circuit appointees, U.S. Court of Appeals for the Federal Circuit Judge Tiffany Cunningham and U.S. Court of Appeals for the Second Circuit Judge Eunice Lee, see *Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information for 2021).

18. *See Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information for 2013). For assessments of the legality and the propriety of the Republican Senate majority's refusal to consider Obama Supreme Court nominee Merrick Garland during a presidential election year, see Robin Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers To Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53 (2016); Carl Tobias, Commentary, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089, 1093 (2017).

19. *See* Press Release, *supra* note 16; *see also* sources cited *supra* note 2.

competently represented individuals accused of federal crime across more than ten years.[20]

Biden correspondingly nominated three highly experienced, mainstream district court nominees. Zahid Quraishi, who became the initial Muslim Article III Judge, had been a long-time New Jersey counsel and was elevated from a magistrate judge position in the District of New Jersey.[21] Regina Rodriguez, who had efficaciously litigated at substantial national law firms over manifold years while capably serving in a United States Attorney Office earlier, captured appointment to the District of Colorado.[22] Julien Neals, who had been a widely respected municipal court jurist in Newark and a Bergen County administrator for years, marshaled confirmation to the District of New Jersey.[23] President Obama had mustered the selection of Neals and Rodriguez during his concluding half-term, but the GOP Senate majority refused to consider the nominees and several dozen more of that President's submissions for confirmation votes.[24] The hearing testimony of

---

20. *See* Press Release, *supra* note 16; *see also* sources cited *supra* note 2; Sweet, *supra* note 12.

21. *See* Press Release, *supra* note 16; *see also* sources cited *supra* note 2; Azi Paybarah, *U.S. Senate Confirms First Muslim Federal District Judge*, N.Y. TIMES (June 11, 2021), https://perma.cc/CQV9-C6ME. *But see* Aymann Ismail, *A Biden Judge Would Be the First-Ever Muslim on the Federal Bench. Some Muslims Are Furious.*, SLATE (Apr. 27, 2021, 6:42 PM), https://perma.cc/V7F9-RS9S.

22. *See* Press Release, *supra* note 16; *see also* sources cited *supra* note 2. *See generally* Fandos, *supra* note 16; Justin Wingerter, *United States Senate Confirms New Colorado Federal Judge After Five-Year Wait*, DENVER POST (June 8, 2021, 2:33 PM), https://perma.cc/3RC5-NVT4 (last updated June 8, 2021, 2:34 PM).

23. *See* Press Release, *supra* note 16; *see also* sources cited *supra* note 2. *See generally* Fandos, *supra* note 16.

24. *See* Press Release, White House, Off. of the Press Sec'y, Presidential Nominations Sent to the Senate (Feb. 26, 2015), https://perma.cc/8R5C-SUBU (announcing the nomination of Julien Neals to be United States District Judge for the District of New Jersey); Press Release, White House, Off. of the Press Sec'y, Presidential Nominations Sent to the Senate (Apr. 28, 2016), https://perma.cc/W4LC-SHU7 (announcing the nomination of Regina Rodriguez to be United States District Judge for the District of Colorado); Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 18–19 (2017). For information surrounding Ketanji Brown Jackson and Zahid Quraishi's nominations, *see generally infra* notes 48–50, 54 and accompanying text. For a valuable, more general source, *see* Elisha Carol Savchak et al., *Taking It to the Next Level*: *The Elevation of*

the three district court nominees merits negligible analysis in this piece, because Quraishi, Rodriguez, and Neals confronted merely a "few friendly questions from [Senators Richard] Durbin (D-IL) and [Cory] Booker (D-NJ)."[25]

When assuming the role of Judiciary Committee Chair, Senator Durbin pledged to strongly and fairly lead the panel and to cultivate rigorous, systematic participation by all of its members. Nevertheless, Durbin admonished Republican committee members that strictures and customs analogous to conventions which Republicans had applied would govern each party. For instance, the Chair distinctly stated that the panel would now retain the GOP "appeals court exception" from the blue slip procedure.[26]

The White House dutifully and swiftly compiled the relevant candidate paperwork while officially marshaling ten nominees' transmission for the Senate in mid-April.[27] The Judiciary panel speedily circulated extensive questionnaires to the nominees who did quickly muster comprehensive, astute responses.[28] The committee granted the public notice of the

---

District Court Judges to the U.S. Courts of Appeals, 50 AM. J. POL. SCI. 478 (2006).

25. *See* Andrew Kragie, *Biden's Appellate Picks Tackle GOP Queries On Race, Politics*, LAW360 (Apr. 28, 2021, 6:54 PM), https://perma.cc/PQM2-ZQJ8; *See generally Hearing on Nominees*, *supra* note 13; Carl Hulse, *The Senate Begins Considering a Diverse Slate of Biden's Judicial Nominees*, N.Y. TIMES (Apr. 29, 2021), https://perma.cc/5PYU-EAEN. Republican members asked the district nominees no questions, because the members focused their attention on the appellate court nominees.

26. *See* Carl Hulse, *Durbin, New Judiciary Chair, Warns Republicans on Blocking Judges*, N.Y. TIMES (Mar. 1, 2021), https://perma.cc/HW6Z-4B7F ("Offering a warning to Republicans, Mr. Durbin said he would reserve the right to end their ability to block district court nominees through the arcane 'blue slip' process . . . if he concluded that they were obstructing nominations without legitimate grounds."); Marianne Levine, *Senate Dems Take a Page from GOP in Judicial Nominee Battles*, POLITICO (Feb. 17, 2021, 4:37 PM), https://perma.cc/4JSD-NXAZ; Tobias, *Senator Chuck Grassley*, *supra* note 8; Tobias, *supra* note 6.

27. The White House nominated Florence Pan to the District of Columbia District Court vacancy left by Judge Jackson's elevation to the D.C. Circuit. Press Release, White House, Off. of the Press Sec'y, Nominations Sent to the Senate (June 15, 2021), https://perma.cc/M69F-3YXF; *see* sources cited *supra* note 16.

28. *See* S. JUDICIARY COMM., *Questionnaire and Responses of Candace Jackson-Akiwumi* (May 5, 2021), https://perma.cc/XZ3F-T6SZ (PDF); S. JUDICIARY COMM., *Questionnaire and Responses of Ketanji Brown Jackson*

April 28 hearing seven days before the panel convened the session and of the identities for the multiple nominees marshaled two days later.[29]

The Chair perceptively opened the April 28 hearing by asserting that the session was clearly "historic," because all five of the prospects are nominees of color, representing substantial "demographic and professional diversity."[30] Each court of appeals nominee supplied comprehensive, probative, and rigorous testimony. Several Republican members emphasized the two nominees' criminal defense representation perhaps in efforts to discredit both of their candidacies. For instance, Senator Tom Cotton (AR) assertively challenged Judge Jackson's representation of a Guantanamo Bay prison "terrorist" detainee, yet the jurist answered that the court had assigned her to the particular litigation.[31] Senator John Cornyn (TX) probed how race might affect the nominee's decision-making, but Judge Jackson replied that she was completely independent and premised every case's determination on its specific law and facts.[32] When Republican senators concomitantly pursued Jackson's viewpoints about expanding the membership of the High Court and regarding

(Apr. 28, 2021), https://perma.cc/W3PC-398C (PDF); S. JUDICIARY COMM., *Questionnaire and Responses of Julien Neals* (Apr. 28, 2021), https://perma.cc/Z8HB-BR2F (PDF); S. JUDICIARY COMM., *Questionnaire and Responses of Regina Rodriguez* (Apr. 28, 2021), https://perma.cc/9X5L-BNUP (PDF); S. JUDICIARY COMM., *Questionnaire and Responses of Zahid Quraishi* (Apr. 28, 2021), https://perma.cc/HYQ4-5CAW (PDF).

29. Hearing Advisory, S. JUDICIARY COMM., Senate Judiciary Comm. to Hold Hearing on First Slate of White House Judicial Nominations, Apr. 23, 2021. When Republican senators possessed a committee majority the previous six years, the majority rarely posted nominee names before the week in which the hearings proceeded. *See* Tobias, *supra* note 4, at 211–17.

30. Senator Durbin strongly praised President Biden's diversity initiatives, while the Chair criticized and lamented Trump's failure to recommend a single Black circuit nominee. *Hearing on Nominees*, *supra* note 12; *see generally* Tobias, *supra* note 7.

31. Judge Jackson elaborated that representing defendants accused of crimes enhances her resolution of numerous cases. *See Hearing on Nominees*, *supra* note 12; Marimow, *supra* note 12; Zoppo, *supra* note 12; *see also* Hulse, *supra* note 27.

32. *See Hearing on Nominees*, *supra* note 12; Marimow, *supra* note 12; Sweet, *supra* note 12; Zoppo, *supra* note 12; Kragie, *supra* note 25; Hulse, *supra* note 27.

Supreme Court opinions, the judge properly and respectfully declined to respond.[33]

Candace Jackson-Akiwumi cautiously deflected or replied to numerous analogous inquiries in ways that resembled Judge Jackson's answers.[34] For example, Senator Chuck Grassley (IA), the current panel Ranking Member, queried the nominee about why she defended a "criminal" prosecuted for trafficking in weapons,[35] yet Jackson-Akiwumi reiterated her cogent admonition that she was duly proffering the careful representation to which defendants accused of crime are entitled in the federal court justice system.[36] When pressed by Republican senators on the effect that race has for jurists' decision-making, she carefully responded: "I don't believe race will play a role in the type of judge I would be if confirmed."[37] However, Jackson-Akiwumi saliently contended that "demographic diversity of all types" performs a substantial role because the various forms of diversity frequently enhance "public confidence in our courts" and enlarge citizen acceptance of the legitimacy which judicial determinations possess.[38] She correspondingly recognized that improved diversity promotes role modeling for young lawyers and students, who could aspire to having public service careers.[39] When GOP legislators directly

33. *See id.*; *see also* Press Release, White House, Off. of the Press Sec'y, Executive Order on the Establishment of the Presidential Commission on the Supreme Court of the United States (Apr. 9, 2021), https://perma.cc/LZ3G-DN5H; Charlie Savage, *Supreme Court Commission to Scrutinize Changes Beyond Expanding Justice Seats*, N.Y. TIMES (Apr. 15, 2021) [hereinafter *Supreme Court Commission*], https://perma.cc/YU9W-YXTZ. *See generally* Charlie Savage, *Experts Debate Reducing the Supreme Court's Power to Strike Down Laws*, N.Y. TIMES (June 20, 2021), https://perma.cc/SMJ8-VP79.

34. *See supra* notes 31–33 and accompanying text.

35. *Hearing on Nominees*, *supra* note 12; *see* Hulse, *supra* note 12; *see also* Tobias, *Senator Chuck Grassley*, *supra* note 8, at 32 (analyzing Grassley's earlier service as Judiciary Committee Chair).

36. Jackson-Akiwumi elaborated: "I stand by [the] oath I took as an attorney, which is to represent zealously everyone who requires federal representation in our federal courts. That's how our system works best." *Hearing on Nominees*, *supra* note 12.

37. *Hearing on Nominees*, *supra* note 12; *see* Sweet, *supra* note 12; Hulse, *supra* note 27; sources cited *supra* note 33.

38. *Hearing on Nominees*, *supra* note 12; *see* Sweet, *supra* note 12; Hulse, *supra* note 27.

39. *See* Sweet, *supra* note 12.

pursued the nominee's ideas respecting expansion of the Supreme Court's magnitude and regarding certain High Court precedents, she respectfully demurred.[40]

The Chair afforded committee members one week to present questions for the record and the nominees seven days to compile responses.[41] All five nominees did promptly submit comprehensive, accurate replies.[42] During a late spring Executive Business meeting, the committee robustly discussed issues which are pertinent to effective judicial service and voted on the nominees.[43] Grassley proclaimed that Republican senators must hold "circuit nominees to a high standard of constitutionalism, regardless of how impressive their credentials are[, but] . . . unless a circuit nominee can show me that he or she is committed to the Constitution as originally understood, I don't think [that the person] should be confirmed."[44] The Ranking Member also contended that Judge Jackson failed to answer whether she believed in a "living Constitution," even though the jurist had explicitly rejected this proposition in her earlier trial level appointments process,[45]

---

40. *Hearing on Nominees*, *supra* note 12; *see* Hulse, *supra* note 27; Savage, *Supreme Court Commission*, *supra* note 33. Jackson-Akiwumi similarly declined to express views on legal issues that she might have to address as a judge. *See Hearing on Nominees*, *supra* note 12; sources cited *supra* note 33.

41. *Hearing on Nominees*, *supra* note 12. Questions for the Record should be rigorous and the queries typically address questions that were not treated during the hearing or issues for which senators lacked sufficient time to probe nominees or for which members pursue elaboration by nominees.

42. *See* S. JUDICIARY COMM., *Kentaji Brown Jackson Responses to Questions for the Record* (May 5, 2021), https://perma.cc/L7M3-7MPY (PDF); S. JUDICIARY COMM., *Candace Jackson-Akiwumi Responses to Questions for the Record* (May 5, 2021), https://perma.cc/KMC4-PQ85 (PDF); S. JUDICIARY COMM., *Julien Neals Responses to Questions for the Record* (May 5, 2021), https://perma.cc/4E6R-F82Q (PDF); S. JUDICIARY COMM., *Zahid Quraishi Responses to Questions for the Record* (May 5, 2021), https://perma.cc/VEF9-LSTV (PDF); S. JUDICIARY COMM., *Regina Rodriguez Responses to Questions for the Record* (May 5, 2021), https://perma.cc/3YYD-2ETP (PDF).

43. *Exec. Business Mtg. Before the S. Comm. on the Judiciary*, 117th Cong. (May 20, 2021), https://perma.cc/Q9EC-LEZ5; *see* Carl Hulse, *Panel Approves First Biden Judicial Picks Over G.O.P. Opposition*, N.Y. TIMES (May 20, 2021), https://perma.cc/C9LA-BUD9 (last updated June 8, 2021).

44. *Exec. Business Mtg.*, *supra* note 43 (prepared statement by Sen. Chuck Grassley).

45. *Exec. Business Mtg.*, *supra* note 43; *Hearing on Judicial Nominations Before the S. Comm. on the Judiciary*, 112th Cong. (Dec. 12, 2012),

while Senator Durbin criticized the idea as a "litmus test."[46] Moreover, Grassley expressed considerable concern respecting nominee Jackson-Akiwumi's "commitment to applying Seventh Circuit and Supreme Court precedents on the Second Amendment [, the designee's current perspectives] on Roe v. Wade[, and certain] other aspects of her time as a federal defender," although the candidate incessantly reassured lawmakers that she would dutifully follow all relevant judicial precedents.[47]

Because the nominees chosen are exemplary selections, who comprehensively and candidly responded to plentiful complicated questions, they merited superb panel ballots. Nonetheless, only *two* Republicans favored Judge Jackson and merely *one* cast a vote for Jackson-Akiwumi's candidacy, although comparatively larger numbers of GOP members helped advance in committee district submissions Neals, Quraishi, and Rodriguez.[48] Thus, Durbin rapidly moved the nominees to the chamber floor.

---

https://perma.cc/GZ5B-EN74 (Response of *Ketanji B. Jack[s]on: Nominee to be United States District Judge for the District of Columbia to the Written Questions of Senator Tom Coburn, M.D.*, at 10–11) (PDF).

46. *Hearing on Nominees Before the S. Judiciary Comm.*, 117th Cong. (June 9, 2021); S. JUDICIARY COMM., *Exec. Business Mtg.* (June 10, 2021). Grassley specifically responded "I think any originalist would admit that you take into consideration all of the constitutional amendments." Madison Alder, *Durbin Pushes Back On Originalism as GOP Test for Judges*, BLOOMBERG LAW (June 9, 2021, 11:22 AM), https://perma.cc/L2TL-EUA7 (last updated June 9, 2021, 1:37 PM).

47. *Hearing on Nominees*, *supra* note 12. Grassley remarked that the "district nominees seemed well qualified" and the Ranking Member voted for all of them. *See* sources cited *supra* note 43; Andrew Kragie, *Senators Advance Judge Jackson, 4 More Biden Judicial Picks*, LAW360 (May 20, 2021, 2:50 PM), https://perma.cc/24B7-JPDT; sources cited *supra* note 33.

48. The committee approval votes were 13-9 (Jackson), 12-10 (Jackson-Akiwumi), 15-6 (Neals), 19-3 (Quraishi), and 17-5 (Rodriguez). *Exec. Business Mtg.*, *supra* note 43; Kragie, *supra* note 47. For similar Republican senator voting patterns regarding chamber floor cloture and confirmation support for the initial five Biden nominees, *see* 167 CONG. REC. S3,953 (daily ed. June 7, 2021) (Julien Neals); 167 CONG. REC. S3,972 (daily ed. June 8, 2021) (Regina Rodriguez); 167 CONG. REC. S4,026 (daily ed. June 10, 2021) (Zahid Quraishi); 167 CONG. REC. S4,027 (daily ed. June 10, 2021) (Ketanji Brown Jackson); 167 CONG. REC. S4,723 (daily ed. June 23, 2021) (Candace Jackson-Akiwumi); 167 CONG. REC. S3,969–71 (daily ed. June 8, 2021) (Julien Neals); 167 CONG. REC. S3,975 (daily ed. June 8, 2021) (Regina Rodriguez); 167 CONG. REC. S4,032 (daily ed. June 10, 2021). (Zahid Quraishi); 167 CONG. REC.

Majority Leader Chuck Schumer (D-NY) attempted to expeditiously conduct confirmation debates and ballots on each nominee, but the GOP rejected unanimous consent to vote on any of the picks. Therefore, Schumer invoked cloture, which ends debate, and a majority concurred.[49] Accordingly, the leader promptly scheduled rigorous nominee chamber debates and positive confirmation ballots.[50]

III. IMPLICATIONS

In short, Biden and the razor-thin Democratic chamber majority efficaciously nominated and confirmed the initial five aspirants who should prove to be exceptional, mainstream, diverse federal jurists. The President cautiously nominated by assiduously consulting senators who represent jurisdictions in which vacancies arose, while the legislators have been receptive to White House Counsel Dana Remus' December importuning by robustly pursuing, evaluating and interviewing talented, moderate, diverse aspirants, recommending the submissions for presidential consideration, and swiftly and carefully processing and confirming the nominees mustered. For example, Biden nominated individuals to Maryland, New Jersey, and Washington district court emergency openings, because the chief executive assigned them critical priority and respectfully consulted the home state senators, who quickly proposed highly accomplished choices.[51] The President and Democratic senators

---

S4,511 (daily ed. June 14, 2021) (Ketanji Brown Jackson); 167 CONG. REC. S4,748 (daily ed. June 24, 2021) (Candace Jackson-Akiwumi); Fandos, *supra* note 16; Hulse, *supra* note 16.

49. *See* 167 CONG. REC. S3,953 (daily ed. June 7, 2021) (Julien Neals); 167 CONG. REC. S3,972 (daily ed. June 8, 2021) (Regina Rodriguez); 167 CONG. REC. S4,027 (daily ed. June 10, 2021) (Zahid Quraishi); 167 CONG. REC. S4,027 (daily ed. June 10, 2021) (Ketanji Brown Jackson); 167 CONG. REC. S4,723 (daily ed. June 23, 2021) (Candace Jackson-Akiwumi).

50. *See* 167 CONG. REC. S3,969–71 (daily ed. June 8, 2021) (Julien Neals); 167 CONG. REC. S3,975 (daily ed. June 8, 2021) (Regina Rodriguez); 167 CONG. REC. S4,032 (daily ed. June 10, 2021). (Zahid Quraishi); 167 CONG. REC. S4,511 (daily ed. June 14, 2021) (Ketanji Brown Jackson); 167 CONG. REC. S4,748 (daily ed. June 24, 2021) (Candace Jackson-Akiwumi); *see* Fandos, *supra* note 16; Hulse, *supra* note 16.

51. The District of Maryland possessed three openings in ten active judgeships; the District of New Jersey confronted six emergencies in seventeen and Washington's Western District faced five in seven. Archive of Judicial

have concomitantly stressed remarkably increased ethnic, gender, ideological, sexual orientation, and experiential court diversity; Biden and the Senate majority were profoundly more attentive to the regular order construct, transparent in the nomination and confirmation systems, and efficient, than former-President Trump and the previous two GOP Senate majorities, while Biden and the Democratic chamber majority simultaneously protected candidate and nominee privacy when clearly deserved.[52]

Trump and the Republican Senate majorities in the 115th and 116th Congress created records for appointing conservative, young, appellate court judges who comprise thirty percent of this bench's active jurists; the individuals can serve for decades. However, President Trump and Republican legislators insistently downplayed "blue" state trial court and emergency vacancies which remained comparatively substantial and diverse confirmations and nominations that continued plummeting. The federal judiciary addresses seventy-five trial level openings, thirty-seven of which implicate emergencies; the

---

Vacancies, *supra* note 3; *see* Tracey Tulley, *Judges Juggle Over 2,700 Cases Each as Families Wait for Day in Court*, N.Y. TIMES (Mar. 17, 2021), https://perma.cc/P42V-PVKX (explaining how New Jersey courts were in the "throes of a crisis" because of the judicial backlog caused by federal bench vacancies); *infra* notes 56–58 and accompanying text.

52. *See supra* notes 8, 11, 26, 29 and accompanying text; *see also* Jennifer Bendery, *Joe Biden is Confirming Judges Faster Than Decades of Past Presidents*, HUFFPOST (June 24, 2021, 5:40 PM), https://perma.cc/PB2N-TNFC; Harper Neidig, *Biden Speeds Ahead on Installing* Judges, HILL (Aug. 8, 2021, 7:00 AM), https://perma.cc/SB2S-QMFN. Important privacy considerations might explain why the initial five White House press releases did not expressly mention that any nominee is an openly LGBTQ individual. However, the sixth slate of nominees includes two openly LGBTQ nominees, while the press release which accompanied the slate trumpets both candidates' historic nomination. *See Sixth Round of Judicial Nominees*, *supra* note 12. *See generally Seventh Round of Judicial Nominees*, *supra* note 12; Jennifer Bendery, *Biden Includes Historic LGBTQ Pick in Latest Judicial Nominees*, HUFFPOST (Aug. 5, 2021, 5:00 AM), https://perma.cc/3272-X7RK; Jennifer Bendery, *Joe Biden Nominates More Historic Firsts To Be Lifetime Federal Judges*, HUFFPOST (Sept. 8, 2021 1:45 PM), https://perma.cc/R954-34RR; Betsy Klein & Phil Mattingly, *Biden Touts LGBTQ Diversity in Announcing Sixth Round of Picks*, CNN, https://perma.cc/BFC6-FG2R (last updated Aug. 5, 2021, 10:37 AM); David Lat, *The Biden Administration's Latest Slate of Judicial Nominees*, ORIGINAL JURISDICTION (Sept. 9, 2021), https://perma.cc/L5D6-JGXC.

latter resemble the figure upon Trump's 2017 inauguration.[53] Moreover, Democrats plainly hold a narrow Senate majority that the party could forfeit soon. Thus, the next portion reviews solutions which Biden and the chamber may evaluate implementing to approve well-qualified, centrist, diverse nominees.

IV. SUGGESTIONS

President Biden has astutely capitalized on some measures that have perennially assisted with the expeditious confirmation of strong nominees. For instance, he perceptively elevated aspirants from lower federal, and state, courts[54] and marshaled renomination for two Obama nominees whom the Republican chamber majority denied appointment in that President's final year.[55] Biden should continue applying both of these concepts, because the first category of prospects has already captured approval, has consummate experience, and has compiled accessible records, while candidates in the second group did progress speedily, because they possessed comprehensive and rigorous ABA examinations and ratings,

53. *See* U.S. FEDERAL COURTS, Vacancy Summary for February 2017, https://perma.cc/KXE6-LRR9 (last updated Feb. 2, 2017); *see also* Joe Walsh, *Biden Enters Office with Fewer Judicial Openings Than Trump*, FORBES (Jan. 20, 2021, 4:47 PM), https://perma.cc/5J5W-9DWE ("The federal judiciary had 117 vacancies due to deaths, retirements and promotions shortly after Trump took office in 2017.").

54. For information on Ketanji Brown Jackson, see *supra* notes 16–19, 30–33, 43–45, 48–50 and accompanying text. For information on Zahid Quraishi, see *supra* notes 21, 25, 39, 43, 48–50 and accompanying text. *See generally* Savchak, *supra* note 24.

55. For information on Julien Neals, see *supra* notes 23–25, 39, 43, 48–50 and accompanying text. For information on Regina Rodriguez, see *supra* notes 22, 24–25, 39, 43, 48–50 and accompanying text. Biden defers to home state senators when he renominates or taps nominees. Lengthy judicial selection experience has prompted the new President to amply consult. Biden may want to carefully analyze renaming certain Trump nominees by avidly consulting home state senators and by deploying a finely-calibrated assessment of nominees' qualifications, vacancies' number and length, and proximity to midterm and presidential election years. *See* sources cited *supra* note 24.

Federal Bureau of Investigation background checks, and committee scrutiny, which only needed updating.[56]

Biden properly established and followed certain important priorities. Most significant was nominating and confirming accomplished, diverse choices for manifold protracted appellate court and district court vacancies and court emergencies. Illuminating are the pairs of superb confirmees who filled Maryland openings and emergency court posts in New Jersey[57] and two more excellent nominees in the latter jurisdiction whom the chamber will probably soon appoint.[58] The Western District of Washington correspondingly realized three prominent, moderate, ethnically diverse nominees for its present five emergencies in seven active judgeships; the committee has already conducted hearings plus approved them.[59] Biden sagely prioritized courts with massive emergencies and vacancies, but

---

56. *See* Tobias, *supra* note 10, at 451–52; *see also* 28 U.S.C. § 631 (providing for a majority of the active judges in the ninety-four districts to undertake magistrate judge appointments, such as the District of New Jersey's appointment of Quraishi); *supra* notes 17–18, 49–50 and accompanying text (documenting Senate confirmations of Judge Jackson to the D.C. District Court and the D.C. Circuit). State court judges receive approval from voters in elections conducted in many states, gubernatorial nomination and legislative confirmation in a number, gubernatorial appointment in some, gubernatorial nomination and commission confirmation in several, and legislative election in a few.

57. For the two excellent Maryland confirmees, see, for example, 167 CONG. REC. S4,573 (daily ed. June 16, 2021) (Lydia Griggsby); 167 CONG. REC. S4,723 (daily ed. June 23, 2021) (Deborah Boardman). For Julien Neals and Zahid Quraishi, the two excellent New Jersey confirmees, see *supra* notes 21, 23–25, 39, 43, 48–50 and accompanying text.

58. *See* Press Release, White House, Off. of the Press Sec'y, Nominations Sent to the Senate (Apr. 29, 2021), https://perma.cc/R3R6-U4BF (Christine O'Hearn); Press Release, White House, Off. of the Press Sec'y, Nominations Sent to the Senate (May 12, 2021), https://perma.cc/TL9Y-E5HX (Karen McGlashan Williams); *see* S. JUDICIARY COMM., *Hearings on Nominees*, (June 23, 2021); S. JUDICIARY COMM., *Hearings on Nominees* (July 14, 2021); S. JUDICIARY COMM., *Exec. Business Mtg*. (July 22, 2021) (discussing and approving Christine O'Hearn); S. JUDICIARY COMM., *Exec. Business Mtg*. (Aug. 5, 2021) (discussing and approving Karen McGlashan Williams). The Senate will probably confirm O'Hearn and Williams upon its return from the August Recess.

59. Press Release (Apr. 29, 2021), *supra* note 58; Press Release (May 12, 2021), *supra* note 58; *Hearing on Nominees* (June 9, 2021), *supra* note 46; S. JUDICIARY COMM., *Exec. Business Mtg*. (July 15, 2021). The Senate will probably confirm David Estudillo, Lauren King, and Tana Lin upon its return from the August Recess.

a number of the tribunals lack officially mustered nominees. The worst-case scenario is actually the four district courts located in the state of California—that presently address eighteen trial court emergencies for which President Biden has yet to marshal a *single* nominee—so the White House might want to redouble initiatives, proffer greater help and even contemplate nominating without awaiting candidate suggestions that home state politicians make.[60]

Several ideas—but not all constructs—on which Biden and the Democratic Senate majority now do rely can restore or maintain the diversity features and the regular order constituents. For example, the President declines to wait on comprehensive American Bar Association inquiries and careful ratings before the White House submits nominations, because the evaluations and rankings ostensibly foster delay,[61] even though the bar association canvasses and ratings may be instructive while restricting designee embarrassment and the selection of nominees who lack the requisite competence to be

60. In addition to California, New York presently confronts four emergencies in nine vacancies. Biden assiduously consulted both states' senators; however, Dianne Feinstein and Alex Padilla slowly recommend picks, and Majority Leader duties consume Schumer. ARCHIVE OF JUDICIAL VACANCIES, *supra* note 3. *See generally* Carl Tobias, *Filling the California Federal District Court Vacancies*, 11 CALIF. L. REV. ONLINE 68 (2020); Madison Alder, *California District Courts in 'Emergency' Await Biden Nominees*, BLOOMBERG LAW (July 28, 2021), https://perma.cc/QE88-D29L; Carl Hulse, *Joe Biden Has the Vision. Now Chuck Schumer Has to Bring It to Life.*, N.Y. TIMES (Apr. 29, 2021), https://perma.cc/3AVE-9C44; Tal Kopan & Bob Egelko, *Federal Court Vacancies Put Pressure on Senators*, *President Biden*, SAN FRANCISCO CHRON. (June 4, 2021), https://perma.cc/6K4Q-C7X4; Andrew Kragie, *Long-Waiting Southern Calif. Bench Gets 7th Vacancy*, LAW360 (July 12, 2021), https://perma.cc/CU8B-XR3C; Jacqueline Thomsen, *Federal Judiciary Eyes Expansion of California Courts In Recommending More Judges*, LAW (Mar. 16, 2021), https://perma.cc/3Z8P-T73E. *But see* Meghann Cuniff, *3 New Federal Trial Judge Nominees Welcomed in California, but Dire Shortage Remains*, LAW.COM: RECORDER (Sept. 9, 2021 5:00 AM), https://perma.cc/93MP-CGSX (analyzing Biden's intention to nominate two Central District of California nominees and one Eastern District of California nominee).

61. *See* Marimow & Viser, *supra* note 6 (explaining how the Biden administration is fast-tracking judicial nominations); *see also* Charlie Savage, *Biden Won't Restore Bar Association's Role in Vetting Judges*, N.Y. TIMES (Feb. 5, 2021), https://perma.cc/WEQ9-VE59 (last updated Feb. 11, 2021); *see generally* Tobias, *supra* note 10, at 432, 440–41, 454–55.

exceptional judges.[62] The President and Democratic lawmakers might consider reinstating the appellate court blue slip policy that did function relatively well in President Obama's tenure, despite recent GOP change, although Democrats have yet to endorse this course of action.[63] Once Biden and the chamber have dutifully restored all of the diversity specifics, which Trump and the Republican Senate majorities routinely disregarded, revitalization of cogent bar association participation in selection and the nascent appellate court blue slip exception might warrant careful investigation and possible implementation.[64]

Republicans and Democrats should now cautiously work to enhance and maximize bipartisanship, perhaps through rethinking and duly recalibrating their behavior. For instance, most of the present Republican Caucus has engaged in lock step cloture and confirmation voting, even though a few members deftly resisted this, particularly regarding trial level choices; Senator Lindsey Graham (SC) favored both appellate court jurists in committee and on the floor, while numerous members effectively cast panel and confirmation ballots for the initial three district judges.[65] Nevertheless, Republicans encouraged ample delay by mandating cloture votes respecting all of Biden's candidates, as Democrats had required for the overwhelming majority of Trump nominees.[66] GOP senators may concomitantly reexamine whether insistence that nominees espouse originalist viewpoints about the Constitution has

62. President Obama refused to nominate any candidate whom the American Bar Association assigned a not qualified rating. However, Trump nominated ten individuals with that ranking and the former President confirmed eight. The ratings, therefore, can alert selection participants to nominee concerns, even those who ultimately secure confirmation. Tobias, *supra* note 4, at 208, 227.

63. The appellate court blue slip policy fosters White House consultation with home state senators and protects those senators' selection prerogatives. *See supra* notes 8, 11, 26 and accompanying text.

64. *See* Dahlia Lithwick, *Biden Borrowed the Federalist Society's Tactics. Good.*, SLATE (Mar. 30, 2021, 2:25 PM), https://perma.cc/GM5T-94TX; *supra* note 26 and accompanying text; *see infra* note 71 (restoring diversity facets must precede restoring regular order).

65. *See supra* notes 43, 48–50 and accompanying text. *But see* sources cited *supra* note 57 (documenting fewer Republican votes for two Maryland judges who enjoyed confirmation).

66. Tobias, *supra* note 4, at 215; *see* sources cited *supra* note 49.

morphed into a litmus test and whether they believe that nominees who defend people accused of crime lack the ability to fairly resolve suits.[67]

The Democratic President and senators might explore whether, in their understandable haste to restore the diversity constituents and regular order components, Democrats impose requirements which now ostensibly erode the minority party's capability to thoroughly investigate nominees. For example, before the initial hearing, the current minority party directly asserted that Senator Graham, when Judiciary Chair, "explicitly refused" to include any D.C. Circuit selection on a nominee hearing panel with another circuit aspirant.[68] However, Democrats expressly retorted that the former Republican Senate majority denigrated the tradition of convening very few sessions to assess multiple circuit nominees and only when the majority party had the minority's permission by conducting *fifteen* hearings, which reviewed greater than one Trump appeals court nominee without seeking the minority's approval.[69] Cotton also claimed that Durbin abruptly terminated Republican discussion of a nominee to register a panel vote before time expired.[70] The GOP correspondingly objected to Democrats' arrangement of a late spring hearing with many nominees for important positions when every senator could have only five minutes to probe numbers of issues, and Senator Cornyn provocatively ridiculed this as a "drive-by hearing [which] trivializes our constitutional responsibility of advice and consent."[71] Durbin and his majority party colleagues

---

67. *See supra* notes 17, 19–20, 31, 35–36, 44–47 and accompanying text.

68. Andrew Kragie, *Judge Jackson, Four Other Judicial Picks Set for Senate Hearing*, LAW360 (Apr. 23, 2021), https://perma.cc/TV4C-BQZF.

69. Durbin has convened two hearings with multiple appellate court nominees. *See Hearing on Nominees*, *supra* note 12; Press Release, *supra* note 16; *see also* Tobias, *supra* note 4, at 213 (holding three hearings for two circuit nominees in Obama's eight years in special situations and with GOP approval).

70. Durbin apologized for any confusion that happened, but the Chair remarked that he had dutifully followed regular order. *Exec. Business Mtg.*, *supra* note 43.

71. Andrew Kragie, *DOJ Nominee On Track as GOP Blasts 'Defense Judges'*, LAW360 (May 26, 2021), https://perma.cc/92MW-NE43; *see generally Hearing on Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (May 26, 2021).

reacted to the above concerns by saying that Democrats were invoking precedents which Republicans had systematically employed during the Trump Administration; the previous ideas trenchantly expose the nuanced tensions between carefully restoring the diversity facets and complete regular order.[72]

Finally, Democrats and Republicans may wish to canvass and institute suggestions that promote the nomination and confirmation of esteemed, mainstream jurists while halting or ameliorating the incessant "confirmation wars" and the counterproductive downward spiraling appointments regime characterized by striking paybacks, stark partisanship, and stunning politicization. A salient, current example on which both parties now agree[73] is the federal bench's compelling, mounting need for substantial additional judicial resources that might allow the courts to felicitously satisfy the essential duty for promptly, inexpensively, and fairly resolving suits,[74] even though Congress has neglected to adopt a comprehensive bill which affords additional circuit and district court jurists over three recent decades.[75] A principal reason for this stalemate is the decided reluctance of the political party that lacks the chief executive to authorize numerous slots which the opposition President specifically fills.

One potential solution for this complication is a "bipartisan judiciary" which enables the political party without the White House to suggest a percentage of aspirants.[76] Congress should astutely tether bipartisan courts and legislation that prescribes

---

72. *See supra* notes 64, 68–71 and accompanying text. The best resolution of this tension—that Biden and Democratic senators are pursuing—is to initially restore diversity and then restore regular order, both of which Trump seriously undercut.

73. *See* H. CTS., INTELL. PROP., & THE INTERNET JUDICIARY SUBCOMM., *Hearing on the Need for New Lower Court Judgeships, 30 Years in the Making* (Feb. 24, 2021); Thomas Berry, *The U.S. Needs More Federal Judges*, WALL ST. J. (Mar. 9, 2021), https://perma.cc/47ZM-LBCV.

74. *See* FED. R. CIV. P. 1; *see generally* Patrick Johnston, *Problems in Raising Prayers to the Level of Rule*: *The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325 (1995).

75. *See* Federal Judgeship Act of 1990, Pub. L. No. 101-650, 104 Stat. 5098; *see generally Hearing*, *supra* note 73.

76. For the recent practice and numerous operational details, see Michael Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003); Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L.J. ONLINE 2051, 2056–58 (2016).

seventy-seven district court, and merely two circuit, posts.[77] This would apply Judicial Conference of the United States recommendations for lawmakers, which the federal court policymaking arm bases on conservative docket and workload estimates that would furnish courts resources of jurists which are necessary to deliver justice.[78] Conjoining a bipartisan judiciary and seventy-plus seats can realize benefits. It may end or temper the appointments process' deterioration and could supply (1) both parties realistic incentives to collaborate, (2) jurists, who bring valuable diversity elements, and (3) courts a number of resources which they must secure.[79]

CONCLUSION

President Biden deftly started implementing his pledge to reverse or lessen the Trump judicial appointments' detrimental effects with the confirmation and nomination of well qualified, moderate submissions whom the initial five jurists clearly

77. The numbers cataloged in the text are recommendations for additional judgeships that the Judicial Conference prepares for Congress, which the Conference believes are necessary for the expeditious, inexpensive, and equitable resolution of federal court disputes. *See supra* notes 73–75 and accompanying text; U.S. JUD. CONF., REP. OF THE PROC. OF THE U.S. JUD. CONF., at 23–24 (Mar. 16, 2021), https://perma.cc/G66N-HGYK; *see also* S. 2535, 117th Cong. § 2 (as reported by S. Comm. on the Judiciary, July 29, 2021), https://perma.cc/Q6SA-BN79 (providing the most recent comprehensive judgeships bill which is premised on the Conference recommendations). For additional recent comprehensive bills that would authorize more than 200 new court of appeals and district judgeships but that Republican members are considerably less likely to support principally because President Biden would fill many of them, see H.R. 4885, 117th Cong. (2021). *See generally* Jacqueline Thomsen, *How Courts Are Reacting to the Latest COVID Spike. Plus*, *Are We Actually Getting More Judges?*, LAW.COM (July 30, 2021), https://perma.cc/8THW-P42G.

78. *See* sources cited *supra* note 77. If Republicans oppose the bipartisan judiciary concept, institution can begin in 2023 or 2025, so neither party will know who may earn the presidency and Senate in the next election and capitalize on winning to game the selection system.

79. *See supra* notes 73–78 and accompanying text. The judicial filibuster may appear pertinent to judicial selection now. However, Democrats' slim majority and their pledge to restore the diversity facets—a crucial aspect of which is retaining fifty votes for cloture and confirmation—means they will not modify this filibuster soon. Retaining fifty votes to restore diversity erodes regular order. *See supra* note 72 (presenting a possible resolution of this tension).

exemplify. The President and the Senate need to capitalize on this auspicious commencement by first rapidly and meticulously filling the numerous circuit, and district, openings with remarkable, mainstream judges, who improve vaunted diversity components, particularly balanced appellate composition, and by next restoring dynamic regular order.