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## Biden, Bennet, and Bipartisan Federal Judicial Selection

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# BIDEN, BENNET, AND BIPARTISAN FEDERAL JUDICIAL SELECTION

CARL TOBIAS\*

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## INTRODUCTION

The U.S. Constitution plainly assigns to the Senate the profound duties of rendering critical advice and consent related to all specific federal judicial nominees whom the President selects.<sup>1</sup> The dynamic roles of senators who directly represent jurisdictions where vacant posts materialize have perennially been crucial to appropriately discharging these essential responsibilities. Senators identify excellent candidates—individuals who possess diversity in terms of ethnicity, gender, sexual orientation, independence, experience, and ideology, as well as the character and measured judicial temperament to be exceptional jurists—assemble complete applications, comprehensively review the prospects, and interview choices whom the senators duly recommend to the President. After the chief executive nominates aspirants, home state politicians must introduce nominees to their Senate colleagues and to the Judiciary Committee and must encourage plentiful upper

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\* Williams Chair in Law, University of Richmond School of Law. I wish to thank Margaret Sanner, Jane Baber, Emily Benedict, Katie Lehen, Carley Ruival, and Jamie Wood for their invaluable substantive and stylistic suggestions, Kristina Hunt, Leslee Stone, and Ashley Griffin for their exceptional word processing, the *University of Colorado Law Review* Forum Editor Jessica Eller for her expeditious, careful, and flexible editorial efforts, for patience, and for sound advice, the University of Richmond Law Library Staff, particularly Paul Birch, Joyce Janto, Alex Hutchings, and Roger Skalbeck, for their excellent research, as well as Russell Williams and the Hunton Andrews Kurth Summer Endowment Research Fund for their generous, continuing support. I assume complete responsibility for any errors that remain in this piece.

1. See UNITED STATES CONST., art. II, § 2. See generally Carl Tobias, *Keep the Federal Courts Great*, 100 B. U. L. REV. ONLINE 196, 199 (2020).

chamber members to assiduously support the nominees proffered.

Colorado Democratic Senator Michael Bennet provides a superlative example for all of his colleagues from both sides of the political aisle, as he has astutely fulfilled those important responsibilities with diligence, expertise, nuanced comprehension of appointments' compelling, albeit mixed histories, immense respect for candidates, nominees, and colleagues, and consummate grace over his years of extraordinary public service. Indeed, Bennet perceptively effectuated initiatives during the starting half term of President Joe Biden's administration to enhance bipartisan collaboration when filling appeals court and trial court vacancies, which arise in Colorado as in much of the United States.

The concerted, powerful efforts of Senator Bennet and President Biden have carefully shattered previous records for appointing federal court jurists quantitatively and vis-à-vis the numerous valuable diversity parameters recounted above. Nevertheless, the selection process has yet to markedly improve and could even be deteriorating in a number of states, especially the many jurisdictions which two Grand Old Party (GOP) senators represent, as the chamber failure to appoint a single judge for any "red" state vacancy throughout President Biden's initial seventeen months compellingly illustrates. On Capitol Hill, principally in the Senate, and effectively in certain geographic areas of the country, Democratic and Republican party accusations and countercharges, stunning partisanship, and striking politicization have created a counterproductive downward spiral which threatens to continue undermining the selection procedures while potentially undercutting public respect for those measures, the presidency, the Senate, the federal courts, and even the rule of law.

In fact, the current state of the appointments process apparently has become sufficiently problematic that Democratic Senator Richard Durbin (IL), the present Judiciary Committee Chair, and Republican Senator Lindsey Graham (SC), the current Ranking Member, caustically and cautiously admonished copious Democratic, Republican, and independent colleagues to expand bipartisanship throughout judicial appointments during the initial Biden nominee committee hearing and the panel's first three Executive Business Meetings as well as numerous subsequent hearings and business

meetings of the nascent 118th Congress.<sup>2</sup> Because the Colorado process to appoint federal court jurists has apparently realized considerably greater success than in most of the nation, which may now be partially attributable to Senator Bennet's prodigious court appointments work, the legislator's endeavors deserve close review to ascertain whether cogent insights might

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2. For example, Chair Durbin and Ranking Member Graham agreed to cooperate on selection by urging that their colleagues work with the White House in finding candidates whom the Democratic and Republican parties could support and in returning "blue slips," which permit the Senate to commence the confirmation process. Graham asked that his Republican colleagues collaborate with Democrats and the White House, but the senator admonished that cooperation must be a "two-way street." See S. Judiciary Comm., *Hearing on Nominees*, Jan. 25, 2023; *id.*, *Exec. Business Mtg.*, Jan. 26, 2023; *id.*, Feb. 2, 2023; Feb. 9, 2023; Madison Alder, *Biden Judge Picks Delayed as Judiciary Panel Members in Flux*, BLOOMBERG (Feb. 2, 2023), <https://news.bloomberglaw.com/us-law-week/biden-judicial-picks-deadlock-as-judiciary-panel-members-in-flux> [<https://perma.cc/L67X-9KVZ>]; Madison Alder, *Graham, Durbin Urge Bipartisanship on Biden Judicial Picks*, BLOOMBERG (Jan. 25, 2023), [https://www.bloomberglaw.com/bloomberg-lawnews/us-law-week/X49EORMK000000?bna\\_news\\_filter=us-law-week#cite](https://www.bloomberglaw.com/bloomberg-lawnews/us-law-week/X49EORMK000000?bna_news_filter=us-law-week#cite); Nate Raymond & Mike Scarcella, *24 Biden Judicial Nominees Advance to Senate Vote*, REUTERS (Feb. 10, 2023), <https://www.reuters.com/legal/government/24-biden-judicial-nominees-advance-senate-vote-2023-02-09> [<https://perma.cc/U6U4-CEX4>]; Nate Raymond, *Graham Urges Republicans to Work With Biden on Judicial Nominees*, REUTERS (Jan. 25, 2023), <https://www.reuters.com/legal/government/graham-urges-republicans-work-with-biden-judicial-nominees-2023-01-25> [<https://perma.cc/5EV9-HFYF>]; Avalon Zoppo, *Bipartisan Tone Struck at Senate Judiciary Committee's 1st Hearing of 2023*, LAW.COM (Jan. 25, 2023), <https://www.law.com/nationallawjournal/2023/01/25/bipartisan-tone-struck-at-senate-judiciary-committees-1st-hearing-of-2023> [<https://perma.cc/9GJU-LTXR>]. See generally Alex Bolton, *Graham Under Fire for Voting for Biden Judicial Nominees*, THE HILL (Feb. 7, 2023), <https://thehill.com/homenews/senate/3847743-graham-under-fire-for-voting-for-biden-judicial-nominees> [<https://perma.cc/GQK8-ZUBK>]; Alex Bolton, *Lindsey Graham in GOP Hot Seat for Speedy Judicial Nominees*, THE HILL (Feb. 17, 2023), <https://thehill.com/homenews/senate/3862311-lindsey-graham-in-gop-hot-seat-for-speedy-judicial-nominees> [<https://perma.cc/6VT8-YN6C>].

These dynamics have persisted since the opening days of the 118th Congress. For example, Chair Durbin recently informed committee members that the federal judiciary experiences fifty-five district court vacancies, thirty-nine of which lack nominees, and twenty-three judicial emergencies. The emergency openings are particularly troubling, because the Administrative Office of the United States Courts, which is the federal courts' administrative arm, premises that designation on empirical information comprising conservative estimates of case and workloads. The Chair also recited the striking statistic that Republican Senate members had returned merely thirteen blue slips to date as contrasted with Democratic chamber members who had returned 120 blue slips throughout former President Donald Trump's tenure. Graham responded by saying that he "could not pick out of a lineup" the White House Counsel, who leads administration judicial selection efforts. S. Judiciary Comm., *Exec. Business Meeting*, Mar. 9, 2023.

actually be derived from Colorado's experience that helpfully inform selection elsewhere.

## I. JUDICIAL SELECTION IN THE BIDEN ADMINISTRATION

Across President Joe Biden's tenure, Senator Michael Bennet has consistently, rigorously, perceptively, and thoroughly implemented numerous confirmation efforts with his accomplished home state Democratic colleague Senator John Hickenlooper.<sup>3</sup> For instance, persistently across the 117th Congress, the two politicians admirably cooperated when filling an open Tenth Circuit judgeship traditionally assigned to Colorado as well as three District of Colorado empty slots with impressive, mainstream jurists. In the last Congress, Bennet and Hickenlooper also persuaded the White House to nominate a very experienced, moderate nominee who recently captured what was the only appointment for current vacancy, while the White House did only recently recommend a nominee for another District of Colorado vacant position that will become open in June.

Immediately after Biden had secured the presidency, the White House Counsel Designate transmitted a letter addressed to senators who represent jurisdictions; that missive distinctly encouraged the legislators to recommend prominent, centrist, diverse aspirants.<sup>4</sup> On May 12, 2021, Biden nominated Veronica

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3. In 2009, Colorado Governor Bill Ritter appointed Bennet to fill the United States Senate seat which Ken Salazar had vacated when the administration of President Barack Obama and Vice President Joe Biden appointed him Secretary of the United States Department of the Interior during January 2009. Bennet subsequently captured election in 2010, while he comparatively easily captured reelection in 2016 and 2022. Hickenlooper had previously served as an extremely popular and exceptionally successful Governor of Colorado before he defeated one-term Republican United States Senator Cory Gardner during 2020. *See* Justin Wingerter, *Why John Hickenlooper Won and Cory Gardner Lost Colorado's U.S. Senate Race*, DENVER POST (Nov. 5, 2020), <https://www.denverpost.com/2020/11/05/john-hickenlooper-cory-gardner-us-senate-2020> [<https://perma.cc/W8YP-5C7F>]; *infra* notes 43–68 and accompanying text.

4. Letter from Dana Remus, White House Counsel Designate, to United States Senators, Dec. 22, 2021; *see also* Madison Alder, *Biden Deadline for Judicial Nominees Challenges Senate Democrats*, BLOOMBERG (Apr. 23, 2021), <https://news.bloomberglaw.com/us-law-week/biden-deadline-for-judicial-nominees-challenges-senate-democrats> [<https://perma.cc/S47B-GZNX>]; Jennifer Bendery, *Biden's Team Tells Senate Democrats to Send Him Judicial Nominees ASAP*, HUFFINGTON POST (Dec. 30, 2020), [https://www.huffpost.com/entry/joe-biden-courts-progressive-nominees\\_n\\_5fecc527c5b6e7974fd18321](https://www.huffpost.com/entry/joe-biden-courts-progressive-nominees_n_5fecc527c5b6e7974fd18321) [<https://perma.cc/Z4R7-UVQV>].

Rossman for a Tenth Circuit opening after much consultation by his administration with the Colorado senators, who declared that they had “worked in partnership with the White House on Rossman’s nomination.”<sup>5</sup> She had professionally served over a decade at the well-regarded Colorado and Wyoming Federal Public Defender Office.<sup>6</sup> Rossman’s early summer committee hearing proceeded relatively smoothly.<sup>7</sup> During mid-July, the panel approved the nominee in a 12-10 vote.<sup>8</sup> On September 20, 2021, the chamber easily appointed Rossman by a 50-42 margin.<sup>9</sup>

When treating the district nominees, Senators Bennet and Hickenlooper appeared to play a more important role by clearly depending on an advisory committee, which essentially helped the legislators screen, interview, and recommend candidates.<sup>10</sup>

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5. See Press Release, Bennet, Hickenlooper Applaud Biden’s Intent to Nominate Veronica Rossman to Serve on Tenth Circuit Court of Appeals (May 12, 2021); White House, Office of the Press Secretary, President Biden Nominates the Third Slate of Judicial Candidates, May 12, 2021.

6. See White House Press Release, *supra* note 5. See generally Michael Karlik, *Biden’s Pick for Colorado-Based Appeals Court Fends Off Republican Criticism of Defense Work*, COLORADOPOLITICS.COM (June 9, 2021), [https://www.coloradopolitics.com/courts/bidens-pick-for-colorado-based-appeals-court-fends-off-republican-criticism-of-defense-work/article\\_b5c62450-c985-11eb-8f23-3b901cee3758.html](https://www.coloradopolitics.com/courts/bidens-pick-for-colorado-based-appeals-court-fends-off-republican-criticism-of-defense-work/article_b5c62450-c985-11eb-8f23-3b901cee3758.html) [<https://perma.cc/JH57-B3J8>].

7. See S. Judiciary Comm., *Hearing on Nominees*, June 9, 2021; Press Release, Hickenlooper, Bennet Introduce Tenth Circuit Nominee Rossman at Confirmation Hearing, June 9, 2021. *But see* Karlik, *supra* note 6; Avalon Zoppo, *Senate Panel Deadlocks on 3rd Circuit Nominee Arianna Freeman*, LAW.COM (Apr. 4, 2022), <https://www.law.com/nationallawjournal/2022/04/04/senate-panel-deadlocks-on-3rd-circuit-nominee-arianna-freeman/?slreturn=20230227164330> [<https://perma.cc/7GK6-EHV2>]. See generally Carrie Campbell Severino, *Who Is Veronica Rossman?*, NAT’L REV. ONLINE, June 9, 2021.

8. S. Judiciary Comm., *Exec. Business Mtg.*, July 15, 2021 (documenting Rossman’s 12-10 committee approval).

9. See ADMIN. OFFICE OF THE UNITED STATES COURTS, JUDICIAL VACANCIES, Confirmations (2021); Release, Bennet’s Statement on Veronica Rossman’s Confirmation to Serve on the Tenth Circuit Court of Appeals, Sept. 20, 2021. See generally Jennifer Bendery, *Biden Puts Another Former Public Defender onto a United States Appeals Court*, HUFFINGTON POST (Sept. 21, 2021), [https://www.huffpost.com/entry/veronica-rossman-public-defender-confirmed-judge\\_n\\_6148e8e6e4b077b735e96e40](https://www.huffpost.com/entry/veronica-rossman-public-defender-confirmed-judge_n_6148e8e6e4b077b735e96e40) [<https://perma.cc/ZYH8-XPPM>].

10. Michael Karlik, *White House Nominates Regina Rodriguez, the Sole Choice of Colorado’s Senators*, COLORADOPOLITICS (Mar. 30, 2021), [https://www.coloradopolitics.com/courts/white-house-nominates-regina-rodriguez-for-judgeship-the-sole-choice-of-colorados-senators/article\\_748918aa-9161-11eb-bc97-bf175645e4e2.html](https://www.coloradopolitics.com/courts/white-house-nominates-regina-rodriguez-for-judgeship-the-sole-choice-of-colorados-senators/article_748918aa-9161-11eb-bc97-bf175645e4e2.html) [<https://perma.cc/XE92-4QQB>]; Chase Woodruff, *Sen. Bennet Defends Judge Recommendation Amid Pushback From Progressive Group*, COLORADONEWSLINE.COM (Feb. 17, 2021), <https://coloradonewslines.com/2021/02/17/sen-bennet-defends-judge->

For example, once Biden preliminarily determined that the White House would include Regina Rodriguez with the administration's first group of nominees,<sup>11</sup> Bennet and Hickenlooper directly lauded the chief executive and Rodriguez, who had been the only candidate the senators proposed.<sup>12</sup> She had practiced with major law firms after capably serving in the United States Attorney Office for Colorado across a number of years.<sup>13</sup> Demand Justice, a progressive lobbying organization, questioned her rather minimal experiential diversity, because Rodriguez had practiced with large firms and served before that as a federal prosecutor, while the group sharply criticized prompt White House nomination and the Colorado senators' recommendation.<sup>14</sup> However, GOP members did not probe her in the April 28 hearing,<sup>15</sup> the committee granted Rodriguez a

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recommendation-amid-pushback-from-progressive-group [<https://perma.cc/6LMN-ZZEQ>].

11. White House, Office of the Press Secretary, President Biden Announces Intent to Nominate 11 Judicial Candidates, Mar. 30, 2021; see Carl Tobias, *How Biden Could Keep Filling the Federal Circuit Court Vacancies*, 80 WASH. & LEE L. REV. ONLINE 1,12 (2022) (documenting how the Obama/Biden Administration had nominated Regina Rodriguez in 2016 for a vacancy on the identical district court; however, the Republican Senate majority steadfastly refused to afford her or several dozen of that administration's additional well qualified, mainstream nominees floor debates and confirmation ballots, which intentionally left significant numbers of vacancies across the United States that former President Trump and Republican Senate majorities in the 115th and 116th Congress ultimately filled).

12. Press Release, Bennet, Hickenlooper Applaud Biden's Intent to Nominate Regina Rodriguez to Serve on U.S. District Court (Mar. 30, 2021); see Karlik, *supra* note 10.

13. Rodriguez became the first District of Colorado Asian American Article III judge. See Press Release, *supra* note 11; *infra* notes 29-34 (Wang became the second Asian American).

14. Colorado Senators Bennet and Hickenlooper powerfully defended Rodriguez and their recommendation of the candidate for President Biden, apparently because the legislators believed that she was very experienced and centrist and perhaps because the Republican Senate majority in the 114th Congress had accorded her shabby treatment in the confirmation process after the Obama/Biden Administration had nominated Rodriguez during 2016. See sources cited *supra* notes 10–12.

15. See S. Judiciary Comm., *Hearing on Nominees*, Apr. 28, 2021; Andrew Kragie, *Biden's Appellate Picks Tackle GOP Queries on Race, Politics*, LAW360 (Apr. 28, 2021), <https://www.law360.com/articles/1379211/biden-s-appellate-picks-tackle-gop-queries-on-race-politics> [<https://perma.cc/8U3U-QJKZ>] (documenting how Republican senators focused their attention on questioning two superb, diverse appellate court nominees, one of whom subsequently became Supreme Court Justice Ketanji Brown Jackson, which meant that the three district court nominees in the first hearing which the Judiciary Committee accorded Biden Administration nominees received merely a "few friendly questions from Senators [Durbin] and [Cory] Booker (D-NJ)". The Republican senators' emphasis may also have reflected

very favorable 17-5 May ballot,<sup>16</sup> and the chamber appointed her the next month with a 72-28 vote.<sup>17</sup>

Like Rodriguez, Charlotte Sweeney, whom President Biden tapped as the nominee for a second Colorado district court vacancy, also proved to be relatively controversial, albeit perhaps for different reasons.<sup>18</sup> In late May 2021, Senators Bennet and Hickenlooper dutifully recommended for nomination Sweeney and two additional promising candidates.<sup>19</sup> Sweeney had professionally, deftly, and successfully litigated pathbreaking civil rights cases pertaining to lesbian, gay,

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their apparently heightened comfort with Rodriguez's practice background or their seeming perception that this nominee might be somewhat less progressive than a significant number of President Biden's other nominees and appointees.

16. See S. Judiciary Comm., *Exec. Business Mtg.*, May 20, 2021 (documenting Rodriguez's very strong 17-5 committee approval); Carl Hulse, *Senate Panel Advances First Biden Judicial Picks*, N.Y. TIMES (May 21, 2021), <https://www.nytimes.com/2021/05/20/us/senate-judges-biden.html> [<https://perma.cc/58NX-SMK4>].

17. See 167 CONG. REC. S3,975 (daily ed. June 8, 2021) (documenting Rodriguez's comparatively strong 72-28 appointment); Press Release, Bennet Statement on Regina Rodriguez's Confirmation to Serve on U.S. District Court, June 8, 2021 (documenting Bennet's Senate floor speech that supported Rodriguez's nomination and confirmation).

18. It was unclear exactly why so many Republican senators apparently considered Sweeney to be rather controversial. One possible explanation, which is illegal, is that certain Grand Old Party senators might have voted against the nominee because the lawmakers were concerned that she would become the first openly lesbian district court judge to capture appointment west of the Mississippi. See White House, Office of the Press Secretary, President Biden Nominates Sixth Round of Judicial Candidates, Aug. 5, 2021; Michael Karlik, *Biden Announces First Openly LGBTQ Federal Judge Nominee for Colorado*, COLORADOPOLITICS.COM (Aug. 6, 2021), [https://www.coloradopolitics.com/courts/biden-announces-first-openly-lgbtq-federal-judge-nominee-for-colorado/article\\_a7ecad4e-f5f5-11eb-9371-f368c299233d.html](https://www.coloradopolitics.com/courts/biden-announces-first-openly-lgbtq-federal-judge-nominee-for-colorado/article_a7ecad4e-f5f5-11eb-9371-f368c299233d.html) [<https://perma.cc/E4NV-WZ6K>]; Feb. 9 *Exec. Business Mtg.*, *supra* note 2 (documenting committee members' discussion prompted by Senator Graham of the difficulty in ascertaining whether discrimination animated a particular senator's decision to not return a blue slip).

19. See Press Release, Bennet, Hickenlooper Send White House Recommendations for District of Colorado Vacancy, May 30, 2021; Michael Karlik, *Bennet, Hickenlooper Send Recommendations to White House for Court Vacancy*, COLORADOPOLITICS.COM (May 21, 2021), [https://www.coloradopolitics.com/courts/bennet-hickenlooper-send-recommendations-to-white-house-for-court-vacancy/article\\_f9b37f7e-ba4d-11eb-b0eb-9b74912ef6ff.html](https://www.coloradopolitics.com/courts/bennet-hickenlooper-send-recommendations-to-white-house-for-court-vacancy/article_f9b37f7e-ba4d-11eb-b0eb-9b74912ef6ff.html) [<https://perma.cc/Q867-Q8VY>]. The other two well qualified individuals whom Bennet and Hickenlooper recommended were Kenzo Kawanabe and Nina Wang, the second of whom subsequently captured rather smooth appointment for a third Colorado district vacancy. See *infra* notes 29-34 and accompanying text.



bisexual, transgender, and queer (LGBTQ) rights.<sup>20</sup> On August 5, Biden nominated Sweeney.<sup>21</sup> During late October, the committee afforded a hearing that proceeded rather smoothly.<sup>22</sup> Early in December, the panel marshaled an 11-11 tie ballot for the nominee.<sup>23</sup> On January 3, 2022, Republican chamber members directly returned Sweeney and numerous analogously well qualified, mainstream other Biden designees to the President,<sup>24</sup> who concomitantly renominated her.<sup>25</sup> Later in that month, the nominee experienced another tie vote.<sup>26</sup> In early May, the chamber discharged Sweeney from the panel with a 51-49 ballot,<sup>27</sup> while on May 25, the Senate appointed her.<sup>28</sup>

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20. Press Release, *supra* note 18; see Press Release, Bennet, Hickenlooper Applaud Biden's Intent to Nominate Charlotte Sweeney to Serve on the U.S. District Court for the District of Colorado, Aug. 5, 2021.

21. See *supra* notes 18, 20.

22. See S. Judiciary Comm., *Hearing on Nominees*, Oct. 20, 2021. See generally Press Release, Hickenlooper, Bennet, Introduce Charlotte Sweeney at Confirmation Hearing for U.S. District Court, OCT. 20, 2021.

23. S. Judiciary Comm., *Exec. Business Mtg.*, Dec. 2, 2021; see Michael Karlik, *Senate Committee Deadlocks on Colorado Judge Nominee*, COLORADOPOLITICS.COM (Dec. 2, 2021), [https://www.coloradopolitics.com/colorado-in-dc/senate-committee-deadlocks-on-colorado-judge-nominee/article\\_09772904-537f-11ec-bea9-a333a2828d21.html](https://www.coloradopolitics.com/colorado-in-dc/senate-committee-deadlocks-on-colorado-judge-nominee/article_09772904-537f-11ec-bea9-a333a2828d21.html) [<https://perma.cc/E4NV-WZ6K>]; Rose Wagner, *Senate Confirms Civil Rights Attorney Holly Thomas to 9th Circuit*, COURTHOUSE NEWS SERV. (Jan. 20, 2022), <https://www.courthousenews.com/nine-judicial-nominees-three-by-a-hair-advance-to-full-senate-vote> [<https://perma.cc/ZQA3-E6EK>].

24. See 168 CONG. REC. S3 (daily ed. Jan. 3, 2022); *infra* note 38 and accompanying text (intersession recesses, unlike new Congresses, do not require that the Senate return nominees who lack confirmation to the President).

25. See 168 CONG. REC. S24 (daily ed. Jan. 4, 2022); *infra* note 38 and accompanying text.

26. S. Judiciary Comm., *Exec. Business Mtg.*, Jan. 20, 2022; see Nate Raymond, *U.S. Senate Confirms 9th Circuit Nominee; Panel Deadlocks on 3 Biden District Judicial Picks*, REUTERS, (Jan. 20, 2022), <https://www.reuters.com/legal/government/us-senate-confirms-9th-circuit-nominee-panel-deadlocks-3-biden-judicial-picks-2022-01-20> [<https://perma.cc/MRY5-BKD4>]; see also sources cited *supra* note 23.

27. See 168 CONG. REC. S2,425 (daily ed. May 11, 2022); Madison Alder, *Colorado Trial Pick Can Advance After Successful Discharge Vote*, BLOOMBERG (May 11, 2022), <https://news.bloomberglaw.com/us-law-week/colorado-trial-pick-can-advance-after-successful-discharge-vote> [<https://perma.cc/U3BZ-KCDD>].

28. See 168 CONG. REC. S2,681 (daily ed. May 25, 2022) (documenting Sweeney's relatively close 48-46 confirmation ballot); Press Release, Bennet, Hickenlooper Celebrate Senate Confirmation of Charlotte Sweeney to the U.S. District Court for the District of Colorado, May 25, 2022. See generally Michael Karlik, *U.S. Senate Confirms Charlotte Sweeney as Colorado's First Openly Gay Federal Judge*, COLORADOPOLITICS.COM (May 25, 2022), [https://www.coloradopolitics.com/courts/u-s-senate-confirms-charlotte-sweeney-as-colorados-first-openly-gay-federal-judge/article\\_328bc2b2-dc34-11ec-9531-9f2509cd52cf.html](https://www.coloradopolitics.com/courts/u-s-senate-confirms-charlotte-sweeney-as-colorados-first-openly-gay-federal-judge/article_328bc2b2-dc34-11ec-9531-9f2509cd52cf.html) [<https://perma.cc/B28B-Y3CR>].

Biden proffered Nina Wang for a third recent Colorado District opening; her selection was relatively uncontroversial, especially in comparison with the two earlier district court nominees. Wang was substantially less controversial in part because she had astutely derived considerable relevant experience from public service as a United States Magistrate Judge plus in the District of Colorado United States Attorney's Office, while she had been a candidate whom Bennet and Hickenlooper recommended to the President for the second empty Colorado district post, so that the legislators were already familiar with her and comfortable with the nominee's candidacy.<sup>29</sup> In early October 2021, both Colorado senators proposed Wang and two additional highly qualified, centrist aspirants for Biden's scrutiny.<sup>30</sup> In late January, the President nominated Wang.<sup>31</sup> During May, she received an uneventful committee hearing at which Senator Bennet "elaborated on [the nominee's] upbringing—her family immigrated from Taiwan," while GOP senators essentially lodged only a small number of

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29. See Press Release, White House Office of the Press Secretary, President Biden Nominates Thirteenth Round of Judicial Candidates (Jan. 19, 2022); Press Release, Hickenlooper, Bennet Cheer Nina Wang's Nomination to Serve on the U.S. District Court for the District of Colorado, Jan 19, 2022. See generally *supra* note 19.

30. See Press Release, Bennet, Hickenlooper Recommend Candidates for U.S. District Court for the District of Colorado (Oct. 7, 2021). The other two candidates whom Bennet and Hickenlooper recommended were Kawanabe and Gordon Gallagher, the latter of whom secured nomination to a fourth District of Colorado vacancy and the Senate confirmed on March 22. *Id.*; see Dennis Webb, *Gallagher Recommended for Federal District Judge Seat*, GRAND JUNCTION SENTINEL (Oct. 28, 2021), [https://www.gjsentinel.com/breaking/gallagher-recommended-for-federal-district-judge-seat/article\\_8c222a94-2791-11ec-a3ac-f35d1f855438.html](https://www.gjsentinel.com/breaking/gallagher-recommended-for-federal-district-judge-seat/article_8c222a94-2791-11ec-a3ac-f35d1f855438.html) [<https://perma.cc/S53R-8FPE>]; Feb. 9 *Exec. Business Mtg.*, *supra* note 2 (documenting Gallagher's comparatively strong 14-7 committee approval); Michael Karlik, *U.S. Senate Judiciary Committee Advances Gordon Gallagher Nomination*, COLORADOPOLITICS (Feb. 9, 2023), [https://www.coloradopolitics.com/courts/u-s-senate-judiciary-committee-advances-gordon-gallagher-nomination/article\\_3e91e5ca-a883-11ed-a070-4b6e00140d29.html](https://www.coloradopolitics.com/courts/u-s-senate-judiciary-committee-advances-gordon-gallagher-nomination/article_3e91e5ca-a883-11ed-a070-4b6e00140d29.html) [<https://perma.cc/X5BF-8RLF>] (same); *infra* notes 36-38 and accompanying text.

31. See sources cited *supra* note 29; Michael Karlik, *Biden Names Magistrate Judge Nina Wang As Judicial Nominee*, COLORADOPOLITICS (Jan. 19, 2022), [https://www.coloradopolitics.com/courts/biden-names-magistrate-judge-nina-wang-as-judicial-nominee/article\\_a8302638-7943-11ec-8ba0-7bc3f3b599d4.html](https://www.coloradopolitics.com/courts/biden-names-magistrate-judge-nina-wang-as-judicial-nominee/article_a8302638-7943-11ec-8ba0-7bc3f3b599d4.html) [<https://perma.cc/6VZK-LTVN>]; Dennis Webb, *Gallagher Passed Over for District Judge Nomination*, GRAND JUNCTION SENTINEL (Jan. 20, 2022), [https://www.gjsentinel.com/news/western\\_colorado/gallagher-passed-over-for-district-judge-nomination/article\\_1dff0c46-794c-11ec-b0f0-b3d2974727bd.html](https://www.gjsentinel.com/news/western_colorado/gallagher-passed-over-for-district-judge-nomination/article_1dff0c46-794c-11ec-b0f0-b3d2974727bd.html) [<https://perma.cc/U95V-U3MZ>].

probing questions.<sup>32</sup> In mid-June, the committee approved her with a 14-8 ballot.<sup>33</sup> On July 19, the Senate efficaciously confirmed Wang by a 58-36 margin.<sup>34</sup>

When two active District of Colorado judges professionally and collegially announced last year that they intended to become senior jurists during 2023, Colorado Senators Bennet and Hickenlooper astutely recognized their solemn constitutional responsibility to duly facilitate the prompt replacement of the highly experienced judges.<sup>35</sup> Therefore, in early August, the legislators decided to “recommend—in consultation with their

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32. See Michael Karlik, *Biden Judicial Nominee Nina Wang Appears Before Senate with Long List of Endorsements*, COLORADOPOLITICS (MAY 25, 2022), [https://www.coloradopolitics.com/courts/biden-judicial-nominee-nina-wang-appears-before-senate-with-long-list-of-endorsements/article\\_92656bf8-dc4c-11ec-a0ef-1b2c4edb7913.html](https://www.coloradopolitics.com/courts/biden-judicial-nominee-nina-wang-appears-before-senate-with-long-list-of-endorsements/article_92656bf8-dc4c-11ec-a0ef-1b2c4edb7913.html) [https://perma.cc/C7RD-CBFC]; S. Judiciary Comm., *Hearing on Nominees*, May 25, 2022.

33. See S. Judiciary Comm., *Exec. Business Mtg.*, June 16, 2022 (documenting Wang’s comparatively strong 14-8 committee approval).

34. See JUDICIAL VACANCIES, Confirmations (2022), *supra* note 9 (documenting Wang’s comparatively strong 58-36 confirmation ballot); Press Release, Bennet, Hickenlooper Celebrate Confirmation of U.S. District Court for the District of Colorado Nominee, Nina Wang (July 19, 2022). See generally Michael Karlik, *U.S. Senate Confirms Nina Wang as Colorado’s Newest Federal Judge*, COLORADOPOLITICS.COM (July 19, 2022), [https://www.coloradopolitics.com/courts/u-s-senate-confirms-nina-wang-as-colorados-newest-federal-judge/article\\_f5e45302-076b-11ed-9e70-43698569a1bf.html](https://www.coloradopolitics.com/courts/u-s-senate-confirms-nina-wang-as-colorados-newest-federal-judge/article_f5e45302-076b-11ed-9e70-43698569a1bf.html) [https://perma.cc/LA4U-YFKD].

35. One of the judges is William Martinez, who announced on February 10, 2022, that he intended to assume senior status on February 10, 2023, and became a senior jurist then. See JUDICIAL VACANCIES, Current Vacancies (2023), *supra* note 9; Michael Karlik, *Federal Judge in Colorado Announces Retirement, Creating Fourth Trial Court Vacancy for Biden*, COLORADOPOLITICS (Feb. 18, 2022), [https://www.coloradopolitics.com/courts/federal-judge-in-colorado-announces-retirement-creating-fourth-trial-court-vacancy-for-biden/article\\_5d06b9e4-90f7-11ec-94a4-af31aea32c7e.html](https://www.coloradopolitics.com/courts/federal-judge-in-colorado-announces-retirement-creating-fourth-trial-court-vacancy-for-biden/article_5d06b9e4-90f7-11ec-94a4-af31aea32c7e.html) [https://perma.cc/LN6T-5ADH]. See generally *infra* note 37 and accompanying text (documenting President Biden’s early September 2022 nomination of part-time Magistrate Judge Gordon Gallagher as Judge Martinez’s replacement).

The second judge is Raymond Moore, who announced on July 27, 2022, that he intended to assume senior status on June 20, 2023. See JUDICIAL VACANCIES, Future Vacancies (2022–23), *supra* note 9; *infra* note 42 and accompanying text (documenting earlier confirmations of Judge Martinez and Judge Moore during the Obama/Biden Administration). See generally *infra* notes 36, 39 and accompanying text (documenting President Biden’s late February 2023 nomination of Magistrate Judge Kato Crews, who had been one of three exceptionally well qualified candidates whom Senators Bennet and Hickenlooper had recommended to the White House in August 2022 for Judge Martinez’s vacancy to which the President nominated Judge Gallagher and was one of several candidates whom the senators recommended to the White House for Judge Moore’s vacancy to which President Biden nominated Crews during late February 2023).

advisory committee—that Biden [effectively analyze] three candidates for both vacancies [whose ample] compassion, intellect and temperament [clearly mean that] all three candidates would [be] excellent jurists and serve the people of Colorado with integrity.”<sup>36</sup>

During early September 2022, the President nominated Gordon Gallagher, who had served as a part-time United States Magistrate Judge for the Colorado District over ten years. His Senate nomination was pending before the committee until December 12, 2022, when the panel accorded the very experienced, mainstream, centrist nominee a relatively uneventful hearing.<sup>37</sup> The nominations of Gallagher and dozens more similar Biden nominees, who were unable to realize confirmation debates and ballots in the 117th Congress, expired on January 3, 2023; the White House renominated most of the nominees who lacked confirmation on this date, and the remainder of the nominees, including Gallagher, twenty days later.<sup>38</sup>

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36. Sundeep K. (Rob) Addy, United States Magistrate Judge Kato Crews, and Magistrate Judge Gordon Gallagher comprised the three candidates. *See* Press Release, Bennet, Hickenlooper Recommend Candidates for U.S. District Court for the District of Colorado, Aug 3, 2022; Michael Karlik, *Senators Send Familiar Set of Names to Biden for Upcoming Judicial Vacancy*, COLORADOPOLITICS (Aug. 3, 2023), <https://www.newsbreak.com/news/2691906971161-senators-send-familiar-set-of-names-to-biden-for-upcoming-judicial-vacancy> [<https://perma.cc/WRU4-8NCB>]; *supra* note 30 (Gallagher had been one of the three strong candidates whom the Colorado senators recommended for the vacancy to which Biden confirmed Wang). The explicit mention by Bennet and Hickenlooper of consultation with the advisory committee suggests that the senators take their responsibilities extremely seriously to recommend the finest candidates who emerge from the best process.

37. White House, Office of the Press Secretary, President Biden Nominates Twenty-Seventh Round of Judicial Candidates, Sept. 2, 2022; *see* Michael Karlik, *Gordon Gallagher Appears at Judicial Confirmations Hearing With Support from Western Slope*, COLORADOPOLITICS (Dec. 13, 2022), [https://www.coloradopolitics.com/courts/gordon-gallagher-appears-at-judicial-confirmation-hearing-with-support-from-western-slope/article\\_ef06abb0-7afd-11ed-8e30-33ea109752fe.html](https://www.coloradopolitics.com/courts/gordon-gallagher-appears-at-judicial-confirmation-hearing-with-support-from-western-slope/article_ef06abb0-7afd-11ed-8e30-33ea109752fe.html) [<https://perma.cc/2LHV-ERTR>]; Editorial, *Why Gallagher Is a Great Choice*, GRAND JUNCTION SENTINEL (Aug. 5, 2022), [https://www.gjsentinel.com/opinion/editorials/why-gallagher-is-a-great-choice/article\\_a815329a-1436-11ed-86fa-733bbe569f0e.html](https://www.gjsentinel.com/opinion/editorials/why-gallagher-is-a-great-choice/article_a815329a-1436-11ed-86fa-733bbe569f0e.html) [<https://perma.cc/FM6J-8VG4>].

38. 169 CONG. REC. S26 (daily ed. Jan. 3, 2023); White House, Office of the Press Secretary, Nominations Sent to the Senate, Jan. 3, 2023; *id.*, Jan. 23, 2023; *see* Nate Raymond, *Biden Renominates 25 Judicial Nominees, Including Longest Pending Ones*, REUTERS (Jan. 3, 2023), <https://www.reuters.com/legal/government/biden-renominates-25-judicial-nominees-including-longest-pending-ones-2023-01-03> [<https://perma.cc/KW22-7YD6>]; Ken Thomas, *Biden Renominates His Picks for Judicial and Diplomatic*

Colorado Senators Bennet and Hickenlooper encouraged Biden to promptly muster a nominee for the jurisdiction's remaining district court vacancy, and the President marshaled the nomination of Magistrate Judge Kato Crews during late February.<sup>39</sup> Because Judge Crews is a highly experienced,

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*Posts*, WALL STREET J. (Jan. 3, 2023), <https://www.wsj.com/articles/biden-to-renominate-his-picks-for-judicial-and-diplomatic-posts-11672718861> [<https://perma.cc/T9T5-TAVN>]; Madison Alder, *Two Biden Judge Picks Aren't Renominated By the White House*, BLOOMBERG (Jan. 23, 2023), <https://news.bloomberglaw.com/us-law-week/more-judicial-renominations-sent-to-senate-three-outstanding> [<https://perma.cc/2YPR-7D8S>]; Nate Raymond, *Biden Renominates Another 17 Judicial Picks; Only 3 Not Resubmitted*, REUTERS (Jan. 23, 2023), <https://www.reuters.com/legal/government/biden-renominates-another-17-judicial-picks-only-three-not-resubmitted-2023-01-23> [<https://perma.cc/5VHX-JSEA>].

Gallagher required a committee discussion, which no panel member requested, and committee approval that the panel granted with a comparatively strong 14-7 ballot on February 9. *See* Feb. 9 *Exec. Business Mtg.*, *supra* note 2; *supra* note 30. Gallagher needed a cloture ballot, a chamber floor debate and a confirmation vote, which the Democratic leadership could have scheduled anytime following Gallagher's panel approval. Accordingly, the Senate did grant Gallagher cloture with a 50-41 ballot on March 2. *See* 169 CONG. REC. S625 (daily ed. Mar. 2, 2023). However, the chamber leadership scheduled confirmation debates and ballots for one appellate court nominee and a significant number of district court nominees before Gallagher and, therefore, only scheduled the nominee's floor debate on March 22 when the Senate confirmed Gallagher with a bipartisan 53-43 vote. 169 CONG. REC. S887 (daily ed. Mar. 22, 2023); *see also* Dennis Webb, *Gallagher Confirmed As Federal Judge, Bringing Court A West Slope Perspective*, GRAND JUNCTION SENTINEL (March 23, 2023), [https://www.gjsentinel.com/breaking/gallagher-confirmed-as-federal-judge-bringing-court-a-west-slope-perspective/article\\_45a9ecde-c8ec-11ed-a329-8b26a433a057.html](https://www.gjsentinel.com/breaking/gallagher-confirmed-as-federal-judge-bringing-court-a-west-slope-perspective/article_45a9ecde-c8ec-11ed-a329-8b26a433a057.html) [<https://perma.cc/67N6-YMHA>]; Press Release, U.S. Senator Michael Bennet, Bennet, Hickenlooper Celebrate Gordon Gallagher's Confirmation to Serve on the U.S. District Court for the District of Colorado (March 22, 2023).

It would be unwarranted to draw any negative inferences from the fact that President Biden included Magistrate Judge Gallagher in the January 23, rather than the January 3, cohort of nominees who received early 2023 renomination. For example, the President had initially selected most nominees in the first package of renominations considerably earlier than Biden tapped Gallagher, while a significant number of the nominees in that cohort who did receive January 3 renomination were substantially more controversial than Gallagher. Indeed, Judiciary Committee Chair Durbin admonished panel members that "there's no presumption that if you didn't make it on the calendar the previous two years you are damaged goods[, explaining that Senate members] just run out of time." Feb. 9 *Exec. Business Mtg.*, *supra*.

39. White House, Office of the Press Secretary, President Biden Names Thirtieth Round of Judicial Nominees, Feb. 22, 2023; *see* Press Release, Bennet, Hickenlooper Celebrate Judge Kato Crews Nomination to Serve on the U.S. District Court of the District of Colorado, Feb. 22, 2023; Michael Karlik, *Biden Nominates Kato Crews for Federal Judgeship*, COLORADOPOLITICS (Feb. 22, 2023), [https://www.coloradopolitics.com/courts/biden-nominates-kato-crews-for-federal-judgeship/article\\_96160b76-b2c1-11ed-99db-cfdcb9568cf2.html](https://www.coloradopolitics.com/courts/biden-nominates-kato-crews-for-federal-judgeship/article_96160b76-b2c1-11ed-99db-cfdcb9568cf2.html)

mainstream individual and very few additional Biden appellate court and district court nominees currently require hearings, he should enjoy a particularly smooth and relatively expeditious confirmation process. Crews has served as a United States Magistrate Judge in the District of Colorado since 2018, was a founding partner of the Hoffman Crews Nies Waggoner & Foster law firm from 2013 until 2018, was a founding partner of the Mastin Hoffman & Crews law firm from 2011 to 2013, and was a partner and associate with the Rothgerber, Johnson & Lyons law firm from 2001 until 2010.<sup>40</sup> Chair Durbin scheduled the nominee's committee hearing exactly one month after Biden had nominated the candidate and Crews' substantial relevant experience and uncontroversial nomination meant that the hearing was comparatively uneventful.

Approximately several weeks after Crews receives a hearing, the panel will convene an Executive Business Meeting

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[<https://perma.cc/U75A-DSW2>]; Press Release, *supra* note 36. Mentioning the late February nomination is not intended as a criticism of President Biden, of the Colorado senators, or of the highly qualified, mainstream nominee. President Biden, the White House, and Senate members have been exceptionally busy addressing Russia's war on Ukraine, Covid-19, America's deteriorating infrastructure, the looming national debt ceiling crisis, and rising inflation, as well as campaigning in the 2022 midterm elections.

It also ultimately became too late in the second session of the 117th Congress for certain new and a plethora of longstanding nominees to receive confirmation during 2022. Moreover, it could have been unfair to nominate candidates immediately before the November 2022 midterm elections, results of which then appeared uncertain, and to possibly require that the nominees place their careers and lives on hold for extended periods. One of the two District of Colorado vacancies only opened comparatively recently and the other empty position will not open until June 2023, so filling that pair of vacancies might not have appeared particularly urgent during 2022. *See* Hannah Metzger, *Biden Nominates Gordon Gallagher as Colorado's U.S. District Court Judge*, COLORADOPOLITICS.COM (Sept. 2, 2022), [https://www.coloradopolitics.com/news/biden-nominates-gordon-gallagher-as-colorados-u-s-district-court-judge/article\\_5ce5e2f0-2adf-11ed-862a-ab19ea9e18b4.html](https://www.coloradopolitics.com/news/biden-nominates-gordon-gallagher-as-colorados-u-s-district-court-judge/article_5ce5e2f0-2adf-11ed-862a-ab19ea9e18b4.html) [<https://perma.cc/SKP8-KQ4V>]. Indeed, the complete lack of President Biden's appellate court nominees as well as minuscule numbers of the President's district court nominees who presently require committee hearings, panel discussions and approvals, chamber floor debates, and confirmation ballots suggested that Magistrate Judge Crews would receive an expedited confirmation process. Moreover, the fact that the committee scheduled the nominee's hearing for March 22, merely one month following his nomination, certainly demonstrates that this Democratic Senate majority intends to appoint Crews in an exceedingly compressed temporal period. S. Judiciary Comm., *Hearing on Nominees*, Mar. 22, 2023.

40. *See* White House Press Release, *supra* note 39; Jimmy Hoover, *Former 10th Cir. Pick Tapped for Kansas District Court*, LAW360.COM (Feb. 22, 2023), <https://www.law360.com/articles/1578911/former-10th-circ-pick-tapped-for-kansas-district-court> [<https://perma.cc/A43J-TMY4>]; Karlik, *supra* note 39.

to deliberate about the nominee's qualifications and cast ballots. The scheduling of Crews' floor debate and confirmation ballot will materialize less swiftly than the nominee's hearing, because five appellate court nominees and nearly twenty-five district court nominees will ostensibly receive chamber debates and final votes before him,<sup>41</sup> so his almost certain confirmation will probably occur during May or June. Because Crews is an extremely strong nominee who in fact experienced a relatively smooth hearing,<sup>42</sup> the Senate will probably confirm him on a bipartisan vote, although the vicissitudes of additional issues, encompassing the national debt, inflation, the war in Ukraine, and other predictable and unpredictable phenomena complicate attempts to prognosticate with substantial certainty how and exactly when the process will conclude.

Accordingly, Senator Bennet, has efficaciously collaborated with Senator Hickenlooper, President Biden, and the senators' Democratic and Republican colleagues to discharge the legislators' acute constitutional responsibilities for providing sound advice and consent on the President's nominees. Senator Bennet, in conjunction with Senator Hickenlooper, has also fulfilled the major duty owed constituents to ensure that the President, the Senate, and particularly lawmakers representing their home states promptly fill seats that materialize within their jurisdictions.

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41. JUDICIAL VACANCIES, Current Vacancies (2023), *supra* note 9.

42. Although there has been some press about one question asked by Senator John Kennedy regarding Brady motions, and about Crews's confessed unfamiliarity with the subject, this was not the "stumble" that certain press outlets have made it out to be, because although "Crews apparently never handled as a judge a single case out of 1,500 that involved Brady [.]his may speak more to the Colorado criminal justice system than to Crews for a number of reasons." Alex Swoyer, *Senator John Kennedy Stumps Another Biden Judicial Nominee in Confirmation Hearing*, THE WASHINGTON TIMES (March 22, 2023), <https://www.washingtontimes.com/news/2023/mar/22/kato-crews-biden-judicial-nominee-unable-answer-ba> [<https://perma.cc/KJ4W-RP4G>]; Michael Karlik, *Kato Crews Appears Before Senate Committee, Fields Tense Questions About Judicial Record*, COLORADOPOLITICS (Mar. 22, 2023), [https://www.coloradopolitics.com/courts/kato-crews-appears-before-senate-judiciarycommittee/article\\_5939842a-c8d4-11ed-a5ff-df0a1687d475.html?ana=9news](https://www.coloradopolitics.com/courts/kato-crews-appears-before-senate-judiciarycommittee/article_5939842a-c8d4-11ed-a5ff-df0a1687d475.html?ana=9news) [<https://perma.cc/ZJW8-JJ2U>]. Michael Karlik, *Colorado Lawyers Sympathetic Towards Kato Crews' Botched Answer at Confirmation Hearing*, COLORADOPOLITICS (Mar. 24, 2023), [https://www.coloradopolitics.com/courts/colorado-lawyers-forgiving-of-kato-crews-botched-answer/article\\_d4\\_2881ee-c9b6-11ed-bd02-e70fc2125327.html?ana=9news](https://www.coloradopolitics.com/courts/colorado-lawyers-forgiving-of-kato-crews-botched-answer/article_d4_2881ee-c9b6-11ed-bd02-e70fc2125327.html?ana=9news) [<https://perma.cc/P4TW-BSZT>].

## II. JUDICIAL SELECTION IN THE OBAMA ADMINISTRATION

Bennet's vigorous, persistent selection activities have not been confined exclusively to Democratic Presidents and chamber majorities. The senator knowledgeably worked on then-current vacancies with President Barack Obama and Colorado Senator Mark Udall (D) across Bennet's nascent term. The legislators collaborated with President Obama to recommend and appoint Scott Matheson for a Tenth Circuit opening assigned Colorado and to suggest, nominate, and confirm Judges Brooke Jackson, William Martinez, and Raymond Moore for the District of Colorado.<sup>43</sup>

## III. JUDICIAL SELECTION IN THE TRUMP ADMINISTRATION

Indeed, Bennet evinced necessary, rather analogous characteristics during the tenure of former Republican President Donald Trump and the razor-thin GOP chamber majority over the 115th and 116th Congress. This political party also included Cory Gardner, who had defeated Udall to become Colorado's other senator after 2014. One productive starting point was Trump's elevation of United States Court of Appeals for the Tenth Circuit Judge Neil Gorsuch to the United States Supreme Court.

Bennet appropriately honored lengthy Senate conventions by professionally introducing the nominee along with home state colleague Gardner at the panel hearing.<sup>44</sup> Bennet capitalized on this opportunity to artfully emphasize the Republican chamber majority's negligible action regarding United States Court of

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43. All four individuals were highly qualified, mainstream nominees, and the jurists have proved to be exceptionally talented, centrist federal judges. The Senate confirmed Matheson, Jackson, and Moore with voice votes and Martinez on a 58-27 ballot. JUDICIAL VACANCIES, Confirmations (2010-11, 2013), *supra* note 9. The latter three jurists comparatively recently announced that they intended to assume senior status. *See id.*, Future Vacancies (2022-23); *supra* note 35 (documenting the determination to assume senior status by the three district court judges); *supra* note 11 and accompanying left (documenting how Republicans who recaptured a Senate majority in 2014 refused to afford cloture ballots, chamber floor debates, and confirmation votes for Regina Rodriguez and dozens of additional well qualified, mainstream Obama/Biden Administration nominees throughout the administration's concluding two years).

44. *See* Press Release, Honoring Senate Tradition, Bennet Introduces Judge Neil Gorsuch, Mar. 20, 2017.



Appeals for the District of Columbia Circuit Chief Judge Merrick Garland's Supreme Court nomination by Obama in March 2016.<sup>45</sup> The senator deftly rejected the temptation to deny Gorsuch a fair hearing because of the Republican chamber majority's failure to provide Garland any serious consideration and pleaded with numerous Democratic and GOP colleagues to accord Judge Gorsuch the kind of respectful treatment which Judge Garland had warranted.<sup>46</sup> Bennet dutifully stated that he would keep an open mind regarding this Supreme Court nomination and in fact expected that the panel hearing could "shed light on [Gorsuch's] judicial approach and [views] of the law."<sup>47</sup> The politician comprehensively scrutinized the jurist's massive record, implored Democratic colleagues to not filibuster Gorsuch, and asked GOP members to reject detonating the "nuclear option" because most essentially "two wrongs never make a right."<sup>48</sup>

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45. See 163 CONG. REC. S2,346 (daily ed. Aug. 5, 2017); Press Release, *supra* note 41. For how the Republican Senate majority actually mistreated President Obama's 2016 nomination of the extraordinarily well qualified Chief Judge of the D.C. Circuit and how the majority should have treated this nominee and that longtime public servant's nomination process, 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, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1093 (2017).

46. Press Release, *supra* note 44 (analyzing how the Republican majority had refused to even consider Obama Supreme Court nominee Garland).

47. Senator Bennet elaborated that "like many Americans, I look forward to the Committee's questions" and nominee Gorsuch's testimony. Bennet concomitantly castigated "Trump's reckless attacks on the judiciary [which] have no precedent in the Republic's history." Press Release, *supra* note 44; see Mark Matthews & Jesse Paul, *The Heat is on for Michael Bennet: Will He Support Supreme Court Nominee Neil Gorsuch ?*, DENVER POST (Mar. 20, 2017), <https://www.denverpost.com/2017/03/20/michael-bennet-neil-gorsuch-us-supreme-court> [<https://perma.cc/MTP4-BZR4>].

48. Press Release, *supra* note 44; see 163 CONG. REC. S2,346 (daily ed. Apr. 5, 2017); Press Release, Bennet Statement on Judge Neil Gorsuch's Nomination, Apr. 3, 2017; Tobias, *supra* note 1, at 215 & n.64; Feb. 9 *Exec. Business Mtg.*, *supra* note 2 (documenting Graham's recent statement that he had vociferously admonished then - Senate Majority Leader Harry Reid (D-NV) not to explode the nuclear option in 2013, because Reid and Democrats would regret igniting the option). When the Republican Senate minority repeatedly denied Obama's three well qualified, mainstream nominees confirmation votes for vacancies that had materialized on the D.C. Circuit, Senator Reid and the Democratic majority detonated the nuclear option. This explosion of the option lowered the votes needed to provide appellate court nominees' cloture from sixty to a majority, which cut off debate, and permitted nominees' confirmation by a majority vote of the Senate. Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L. J. 121 (2015). The Republican Senate majority exploded the nuclear option to limit future votes on Supreme Court nominees,

When, despite Bennet's persuasive importuning, Republicans determined that they would promptly explode the nuclear option, the senator peremptorily criticized alterations of the upper chamber rules that have inflicted abundant damage on the Supreme Court and the process for marshaling Justices.<sup>49</sup> Bennet was effectively unable to "ignore this new reality" which required that the senator evaluate Gorsuch in this modified context.<sup>50</sup> Bennet expressly stated that the nominee "is a qualified judge who [earned] an up-or-down vote [but] is very conservative," which raised many decidedly acute concerns respecting "his approach to the law" that ultimately did convince the lawmaker to "vote no."<sup>51</sup>

This resolution may appear to depart from Bennet's concerted practice of attempting to support Colorado federal court nominees and cultivate bipartisanship, which proved efficacious in Colorado to confirm appellate court and district court jurists. However, Trump made the Gorsuch nomination shortly after the GOP majority's unprecedented refusal to consider Garland's High Court nomination, each particular Supreme Court nomination process is *sui generis*, and Bennet devoted considerable effort to the nomination process for Gorsuch. Moreover, bipartisanship could simply lack efficacy, particularly in the stunningly politicized and charged environment of Supreme Court vacancies.

Perhaps even more illuminating was how Senator Bennet addressed former President Trump's determination, which nominated Colorado Supreme Court Justice Allison Eid to Gorsuch's vacant Tenth Circuit vacant post in early June 2017, without deploying the conventional approach of thoroughly consulting the senators who represent the jurisdiction in which

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notwithstanding Bennet's admonition and his efforts to prevent this in 2017 and deployed a similar technique for district nominees in 2019. *See* Tobias, *supra* note 1, at 216-17; sources cited *supra* note 45.

49. *See* Press Release, Bennet Statement on Judge Gorsuch's Confirmation Vote (Apr. 6, 2017). *See generally* Seung Min Kim, *Bennet Struggles for Middle Ground Amid Gorsuch War*, POLITICO (Apr. 2, 2017), <https://www.politico.com/story/2017/04/michael-bennet-neil-gorsuch-colorado-scotus-236766> [<https://perma.cc/Q49U-HDYP>].

50. *See* Press Release, *supra* note 49.

51. *See* Press Release, *supra* note 49; 163 CONG. REC. S2,442 (daily ed. Apr. 7, 2017); Jennifer Bendery, *Democratic Senator Takes Heat Back Home Over Neil Gorsuch Confirmation*, HUFFINGTON POST, (Apr. 20, 2017), [https://www.huffpost.com/entry/michael-bennet-neil-gorsuch-supreme-court\\_n\\_58f7be74e4b05b9d613fc87c](https://www.huffpost.com/entry/michael-bennet-neil-gorsuch-supreme-court_n_58f7be74e4b05b9d613fc87c) [<https://perma.cc/E6R9-YAF2>].

a vacancy arises.<sup>52</sup> Bennet tendered a measured response: “It’s unfortunate that this White House failed to follow the traditional practice of working with the home state senators to fill this seat with the input of the Colorado legal community.”<sup>53</sup> Nevertheless, the politician did appropriately remark: “Justice Eid deserves full consideration by” senators, while observing that he looked forward to reviewing her dense record.<sup>54</sup>

Gardner voiced much potent support for Trump’s nominee, proclaiming that she had long ardently defended the Constitution and was plainly “committed to upholding the rule of law.”<sup>55</sup> At the September 20 hearing, Gardner introduced “Justice Eid, who [the politician found] is superbly qualified for the position,” effusively characterizing the nominee as “fiercely independent” and a “mainstream, commonsense Westerner [who] has and does care deeply about robust debate and hearing the views of others.”<sup>56</sup> She rigorously “tussled” with numerous

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52. See White House, Office of the Press Secretary, President Trump Announces Judicial Candidate Nomination, June 7, 2017; Mark Matthews, *President Trump Nominates Allison Eid to Neil Gorsuch’s Seat on Tenth Circuit Court of Appeals*, DENVER POST (June 7, 2017), <https://www.denverpost.com/2017/06/07/donald-trump-allison-eid-nomination-10th-circuit-court-of-appeals> [<https://perma.cc/5YCN-853X>]. But see JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 17 (2017) (documenting the federal court policymaking entity’s biennial recommendation that implored the President and the Senate to refrain from filling the Tenth Circuit vacancy for which Eid received nomination, which Trump and the Republican Senate majority basically ignored).

53. Press Release, Bennet Remarks on President Trump’s Nomination of Allison Eid to Tenth Circuit, June 7, 2017; see Matthews, *supra* note 52.

54. See sources cited *supra* note 53. A Bennet staff member remarked that “it’s premature to comment on whether Bennet would try to block Eid, and we’re going to wait until all the materials are submitted.” See Matthews, *supra* note 52.

55. Gardner contended that Eid’s behavior which he glowingly described accurately reflected the nominee’s core values, “whether she was clerking for Justice Clarence Thomas, teaching at [Colorado University] Law, arguing cases as Colorado’s Solicitor General, or writing opinions as a member of the state’s Supreme Court.” Matthews, *supra* note 52. The senator had earlier championed Eid for the Supreme Court vacancy which Gorsuch filled and for Gorsuch’s Tenth Circuit seat. Mark Matthews, *Allison Eid’s Record Bends to Trump’s Conservatism*, DENVER POST (Sept. 19, 2017), <https://www.denverpost.com/2017/09/19/colorados-allison-eid-whose-record-bends-trumps-conservatism-appeals-court-nomination-senate> [<https://perma.cc/3UK8-V9KF>].

56. See S. Judiciary Comm., *Hearing on Nominees*, Sept. 20, 2017. See generally Erin Prater, *Gardner Introduces Eid to U.S. Senate Judiciary Committee Ahead of Confirmation Hearing*, COLORADOPOLITICS (Sept. 20, 2017), [https://www.coloradopolitics.com/news/gardner-introduces-eid-to-u-s-senate-judiciary-committee-ahead-of-confirmation-hearing/article\\_0512ee3e-15ce-55b9-b404-a3c1a43ce093.html](https://www.coloradopolitics.com/news/gardner-introduces-eid-to-u-s-senate-judiciary-committee-ahead-of-confirmation-hearing/article_0512ee3e-15ce-55b9-b404-a3c1a43ce093.html) [<https://perma.cc/K63K-HLYF>].

Democrats on the committee, who “repeatedly questioned whether Eid [had been overly deferential] to authorities on matters related to civil liberties.”<sup>57</sup> One press account stated that the hearing comprised a “number of back-and-forth moments, [yet] there weren’t any major flare-ups that hinted her nomination was in danger.”<sup>58</sup> A Bennet staffer commented that the politician remained “undecided and would [diligently] review Justice Eid’s record and testimony from her hearing before making a decision.”<sup>59</sup> Following significant robust committee discussion, the nominee earned late October party-line approval.<sup>60</sup>

The following week, the Senate conducted minimal debate involving Justice Eid. Gardner powerfully reiterated that the nominee would be an open-minded “guardian of the Constitution,” and she felicitously won confirmation.<sup>61</sup> Notably, Bennet was among four Democrats who voted to confirm the nominee. The politician’s staff member remarked that, although Bennet clearly “does not agree with her conservative judicial philosophy, appointment” would mean that the tribunal’s composition basically remained unchanged, and Bennet concomitantly ascertained that nominee “Eid’s time on the Colorado Supreme Court and other experiences make her qualified for the position.”<sup>62</sup>

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57. See Mark Matthews, *Eid on Course to Replace Neil Gorsuch on Federal Appeals Court After Tussle with Senate Panel*, DENVER POST (Sept. 20, 2017), <https://www.denverpost.com/2017/09/20/allison-eid-replace-neil-gorsuch-federal-court-appeals-court-after-tussle-senate-panel> [https://perma.cc/BHB5-K5BT]; *Hearing*, *supra* note 56.

58. The nominee’s strong qualifications, the Republican Senate majority, and particularly the detonation of the nuclear option which eliminated filibusters made Justice Eid’s confirmation probable. Matthews, *supra* note 57; *Hearing*, *supra* note 56; *supra* note 48.

59. Matthews, *supra* note 57.

60. See S. Judiciary Comm., *Exec. Business Mtg.*, Oct. 26, 2017 (documenting Justice Eid’s relatively close 11-9 committee approval vote). See generally Jesse Paul, *Eid’s Nomination to Federal Court in Denver Advances Despite United Democratic Opposition*, DENVER POST (Oct. 26, 2017), <https://www.denverpost.com/2017/10/26/allison-eid-nomination-advances> [https://perma.cc/XW8D-A8VQ].

61. See 163 CONG. REC. S6,980-81 (daily ed. Nov. 2, 2017) (documenting Justice Eid’s comparatively strong 56-41 confirmation ballot); see Jesse Paul, *Allison Eid Confirmed to Tenth Circuit Court of Appeals*, DENVER POST (Nov. 2, 2017), <https://www.denverpost.com/2017/11/02/alison-eid-confirmed> [https://perma.cc/8JQ5-AX45].

62. Megan Verlee, *U.S. Senate Approves Colorado’s Eid for 10th Circuit Court of Appeals*, COLORADO PUBLIC RADIO, Nov. 2, 2017. Bennet’s affirmative confirmation ballot for Justice Eid reaffirmed that the senator’s usual practice is to

Trump only had the opportunity to approve a single District of Colorado nominee throughout his four-year tenure, and the process to fill the open court slot was relatively uneventful, albeit protracted. In early October 2017, Trump proffered nominee Daniel Domenico, who had professionally served as Colorado's Solicitor General for almost ten years.<sup>63</sup> In late January 2018, the committee marshaled a hearing which proved to be rather uncontroversial,<sup>64</sup> and a few weeks thereafter the panel reported Domenico with a slim party-line 11-10 ballot.<sup>65</sup> Early in the following January his nomination expired, while subsequently that month, President Trump renominated Domenico.<sup>66</sup> On February 7, the nominee captured panel approval with a 12-10 vote.<sup>67</sup> Two months later, Senator Gardner praised Domenico's "impeccable legal credentials," urging that jurists and practitioners throughout the state highly respected the nominee.<sup>68</sup> The Senate relatively easily confirmed him on a 57-42 ballot, while Bennet plus three other Democrats voted to appoint the nominee.<sup>69</sup>

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support Colorado nominees through bipartisanship, insofar as the vote against Judge Gorsuch might be perceived as a departure from the senator's normal approach. *See supra* notes 44-51, *infra* note 69 and accompanying text.

63. White House, Office of the Press Secretary, Eight Nominations Sent to the Senate Today (Oct. 2, 2017); Jesse Paul, *Daniel Domenico Former State Solicitor General, Is Nominated by Donald Trump to Serve on Colorado's Federal Bench*, DENVER POST (Sept. 28, 2017), <https://www.denverpost.com/2017/09/28/daniel-domenico-nominated-by-donald-trump-serve-colorado-federal-bench> [<https://perma.cc/F6W9-LE8A>].

64. S. Judiciary Comm., *Hearing on Nominees*, Jan. 24, 2018.

65. S. Judiciary Comm., *Executive Business Mtg.*, Feb. 18, 2018 (documenting Domenico's very close 11-10 committee approval vote).

66. White House, Office of the Press Secretary, Nominations Sent to the Senate, Jan. 23, 2019.

67. S. Judiciary Comm., *Exec. Business Mtg.*, Feb. 7, 2019 (documenting Domenico's improved 12-10 committee approval vote); *see* Justin Wingerter, *Denver Lawyer Approved for Federal Judgeship After Long Wait*, DENVER POST (Apr. 9, 2019), <https://www.denverpost.com/2019/04/09/denver-federal-judge-dan-domenico-senate/> (reporting that numerous Democrats "had questions about Domenico's views" regarding marriage equality). [<https://perma.cc/AR52-LN78>].

68. 163 CONG. REC. S2,301 (daily ed. Apr. 9, 2019); *see* Wingerter, *supra* note 67.

69. 163 CONG. REC. S2,306 (daily ed. Apr. 9, 2019) (documenting Domenico's comparatively strong 57-42 confirmation ballot). Bennet seemed to consider Domenico well qualified similarly to how the senator determined that Justice Gorsuch and Justice Eid were. Bennet's affirmative vote for Domenico, as with his ballot that favored Justice Eid, reaffirmed the senator's general approach of supporting Colorado nominees through bipartisanship and that Bennet's vote against Gorsuch may have been an aberration, which could have been attributable

## CONCLUSION

In conclusion, Michael Bennet has thoroughly, rigorously, and fairly served the Colorado electorate, plentiful Democratic and Republican White Houses, and numerous Senate colleagues for many years by invaluable discharging his fundamental responsibility to advise and consent on judicial nominees, assuring that Colorado vacancies which materialize are promptly filled with very talented, centrist jurists, and by conscientiously engaging in bipartisan selection. These phenomena proved especially true across the last pair of years during which Bennet collaborated actively with home state colleague John Hickenlooper and with the President Joe Biden's White House. Bennet needs to assiduously continue working alongside Hickenlooper, chamber members in each party, Biden, and the White House to comprehensively increase bipartisanship in order to enable the President and the Senate to fulfill their duties to nominate and confirm well-qualified, mainstream judges who promptly, inexpensively, and equitably resolve substantial caseloads.

Finally, all who participate in the federal court nomination and confirmation processes ought to consult astute Colorado appointments generally plus Bennet's bipartisan court approach specifically, because they now provide constructive templates, which should dramatically enhance the federal judicial appointments process. Most importantly, the White House should assertively and thoroughly consult senators who represent jurisdictions in which vacancies arise, when making nominations. Democratic and Republican senators need to collegially and cooperatively work with each other and with the President, while all individuals and organizations participating in judicial selection must eschew growing partisanship and striking politicization, which have eviscerated smooth confirmations. All participants in the appointments process must implement these positive phenomena for the good of the President, the Senate, the courts, and the country.

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to the numerous predictable and unpredictable phenomena which pervade each Supreme Court nomination process. *See supra* note 62.