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## How Biden Could Keep Filling the Federal Circuit Court Vacancies

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# How Biden Could Keep Filling the Federal Circuit Court Vacancies

Carl Tobias\*

## *Abstract*

*In October 2020, Democratic presidential nominee Joe Biden speculated that the fifty-four talented, extremely conservative, and exceptionally young, appellate court judges whom then-President Donald Trump and two relatively similar Grand Old Party (GOP) Senate majorities appointed had left the federal appeals courts “out of whack.” Problematic were the many deleterious ways in which Trump and both of the upper chamber majorities in the 115th and 116th Senate undermined the courts of appeals, which are the courts of last resort for practically all lawsuits, because the United States Supreme Court hears so few appeals. The nomination and confirmation processes which Trump and the Republican Senates instituted and the numerous extraordinarily conservative judges whom they confirmed undercut appellate court diversity in terms of ethnicity, gender, sexual orientation, ideology, and experience; the appointments procedures; and citizen respect for this critical responsibility’s discharge, the presidency, the Senate, and the federal bench. Peculiarly important, some cases which Trump appointees have*

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*decided show how prescient was Biden's rather impressionistic answer to a press question regarding the controversial issue of Supreme Court packing, which the nominee afforded near the 2020 presidential election's conclusion. For example, Trump United States Court of Appeals for the Fifth, Sixth, and Eleventh Circuit confirmees' judicial decision-making elucidates these propositions. Therefore, Biden promised that his administration would comprehensively remedy those stunning problems.*

*This essay's initial section examines the nomination and confirmation procedures initiated by the GOP White House and each of the Republican Senate majorities, which permitted Trump and the chamber to appoint substantial numbers of exceptionally conservative appeals court judges, mainly by contravening, rejecting, or downplaying numerous rules and conventions that prior Presidents and the Senates had applied to felicitously appoint preeminent, moderate, diverse court of appeals jurists. Part one scrutinizes how Trump and the GOP chambers easily nominated and confirmed significant numbers of judges whose opinions could affirm his troubling presidential behavior and concomitantly reject Biden's efforts that would ostensibly move the nation in better directions.*

*Segment two evaluates manifold endeavors of Biden's presidency and the Senate Democratic majority which carefully address Trump circuit appointments' detrimental impacts. This portion reveals that Biden deployed lessons which the President had extracted from leading responsibilities that he discharged as a Judiciary Committee member and the panel Chair, particularly which implicated Supreme Court nomination and confirmation processes, and from service as Vice President in President Barack Obama's Administration. Biden has correspondingly relied substantially upon high-ranking executive branch officials with longtime appointments experience, tapping, for example, Ronald Klain as his chief of staff while appointing Dana Remus White House Counsel, from the Obama era while employing numbers of effective selection practices which Presidents Obama and Trump and earlier Republican and Democratic chief executives had instituted.*

*Part three surveys the consequences for appeal courts of Trump's judicial appointments efforts and the implications of*

*how President Biden responded. The court selection measures that the Democratic chief executive implemented allowed the White House and the Senate to appoint prominent, comparatively mainstream, diverse jurists, which eclipsed Trump’s record for approving twelve very conservative, accomplished, youthful judges throughout a first presidential year. The considerable success of Biden and the Democratic Senate majority respected their pledges to directly rectify Trump confirmations’ adverse effects, improve numerous critical diversity features, and restore dynamic “regular order” across the judicial appointments process.*

*The difficulties—particularly appointing rapidly so many accomplished, highly conservative, lifetime jurists, which former President Trump and GOP senators certainly orchestrated—will remain for a significant number of years and Democrats currently possess an exceptionally narrow Senate majority. The concluding portion, accordingly, provides numerous recommendations for how President Biden and the chamber might continue increasing diversity, namely ideological, and revitalizing dynamic regular order to efficaciously improve the federal courts of appeals.*

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INTRODUCTION

During late October 2020, then-presidential candidate Joe Biden surmised that the fifty-four accomplished, exceptionally conservative, and strikingly youthful, appeals court judges whom former Republican President Donald Trump and two

comparatively analogous Grand Old Party (GOP) Senate majorities confirmed had rendered the federal appellate courts “out of whack.”<sup>1</sup> Remarkable were the numerous detrimental ways in which President Trump and those upper chamber majorities in the 115th and 116th Congress undercut the appellate courts, which are the tribunals of last resort for virtually all cases, because the United States Supreme Court entertains a minuscule percentage of lawsuits. The nomination and confirmation procedures which Trump and the GOP chambers implemented and the many conservative jurists whom they approved undermined court of appeals diversity vis-à-vis ethnicity, gender, sexual orientation, ideology, and experience; the process of court selection; and public respect for this crucial duty’s satisfaction, the presidency, the Senate, and the federal judiciary. Particularly salient, certain appeals which Trump confirmees have resolved demonstrate how prescient was Biden’s comparatively impressionistic response to a press query about the controversial action of Supreme Court packing, which the candidate supplied as the 2020 presidential election drew to a close. For instance, Trump Administration United States Court of Appeals for the Fifth, Sixth, and Eleventh Circuit appointees’ opinions illuminate these problematic concepts. Accordingly, Biden pledged that he would carefully rectify those stunning difficulties.

Part I evaluates the nomination and confirmation practices instituted by the Republican White House and both of the GOP chamber majorities, which allowed Trump and the Senate to seat huge numbers of extremely conservative appellate court jurists, mostly by violating, ignoring, or deemphasizing numerous requirements and customs that earlier Presidents and the chambers had adopted to smoothly confirm prominent, mainstream, diverse judges. Subpart one peruses how Trump readily approved substantial numbers of jurists whose decision-making could plainly sustain his administration’s questionable presidential behavior and correspondingly reject

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1. Dave 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/933X-3A5L>; Annie Linskey, *Biden Squeezed on the Supreme Court, Promises a Commission to Consider Supreme Court Changes*, WASH. POST (Oct. 22, 2020, 8:50 PM), <https://perma.cc/VW5J-FRQJ>.

Biden's salient attempts that would move the country in new, relatively promising directions.

Part II examines myriad initiatives of Biden's nascent presidency and the Democratic Senate majority which counter Trump appellate confirmation processes' adverse effects. The segment reveals that President Biden capitalized on lessons which the chief executive had derived from leadership roles that he assumed when a Senate Judiciary Committee member and panel Chair, especially which involved High Court nomination and confirmation processes, and from vice presidential service during President Barack Obama's tenure. Biden has concomitantly invoked specific personnel with longstanding appointments expertise, naming, for instance, Ronald Klain as chief of staff and efficaciously making Dana Remus White House Counsel, from the Obama period while deploying numerous strong procedures which Presidents Obama and Trump as well as their Republican and Democratic predecessors had systematically implemented.

Part III explores the implications for appellate courts of Trump's efforts and the consequences of how Biden responded to those impacts. The judicial appointment strictures that the Democratic President and Senate initiated enabled the chief executive and the chamber to duly approve numerous preeminent, relatively moderate, diverse jurists, which surpassed Trump's record for confirming one dozen accomplished, conservative, young judges over an initial presidential year.<sup>2</sup> The consummate success of Biden and the chamber honored their promises to remedy Trump appointments' deleterious ramifications, increase numbers of core diversity features, and creatively restore dynamic "regular order" across the judicial selection process.

The dilemmas—especially confirming quickly so many able, conservative, life-tenured jurists, which former Republican

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2. See Catie Edmondson, *Senate Confirms Biden's 40th Judge, Tying a Reagan-Era Record*, N.Y. TIMES (Dec. 8, 2021), <https://perma.cc/597F-ZXEV> (stating that Biden clearly outpaced Trump's eighteen judges in his first year); John P. Collins, Jr., *Judging Biden*, 75 SMU L. REV. F. 150, 151–52 (2022) ("President Biden and his allies in the Senate are confirming appellate judges at a breakneck pace."); John Gramlich, *Biden Has Appointed More Federal Judges Than Any President Since JFK At This Point In His Tenure*, PEW RESEARCH CENTER (Aug. 9, 2022), <https://perma.cc/3D2U-X8DA> (reaching a similar conclusion regarding circuit and district appointments).

President Trump and GOP senators clearly orchestrated—will persist for a significant number of years and Democrats presently have a razor-thin chamber majority. The last segment, therefore, proffers numerous suggestions for how President Biden and the Senate can multiply diversity, notably ideological, and revive distinctive regular order to effectively improve the federal appellate courts.

### I. TRUMP ADMINISTRATION JUDICIAL SELECTION

The 2020 presidential and chamber elections followed one term in which former President Trump and both Grand Old Party Senate majorities confirmed three highly talented, exceptionally conservative, and relatively youthful United States Supreme Court Justices, fifty-four accomplished, similarly conservative, young appellate court judges plus 174 comparatively analogous district court jurists by rejecting, changing, or downplaying the venerable norms that have perennially supported the approval of prominent, mainstream appeals court and district court judges.<sup>3</sup> For example, the Trump Administration only infrequently consulted numbers of senators who represented plentiful jurisdictions that encountered vacancies, although the lawmakers inherently possessed greater familiarity with superb prospects than most executive branch officials.<sup>4</sup> Trump also significantly confined American Bar Association (ABA) involvement with federal court selection, even though Presidents in office since the 1950s, except former Presidents George W. Bush and Trump, depended substantially on the bar association's comprehensive, methodical investigations and expert ratings.<sup>5</sup> President Trump

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3. See *Confirmations*, U.S. COURTS, <https://perma.cc/P5XS-ZPYU> [hereinafter *Confirmations*] (listing the confirmations from the 117th Congress thus far). I depend substantially in this paragraph and this section on Carl Tobias, *Keep the Federal Courts Great*, 100 B.U. L. REV. ONLINE 196, 204–20 (2020) [hereinafter Tobias, *Keep the Federal Courts Great*] and Collins, *supra* note 2, at 151.

4. See Tobias, *Keep the Federal Courts Great*, *supra* note 3, at 206–07 (remarking on Trump's rejection of "judicial selection rules and conventions"); see also Collins, *supra* note 2, at 156–57 (criticizing the out-of-touch nature of Trump's nomination and confirmation strategies).

5. See Carl Tobias, *Selecting District Judges in the 116th Senate Lame Duck Session*, 37 YALE J. ON REG.: NOTICE & COMMENT, 3 & 3 nn.7–8 (2020), <https://perma.cc/2D5T-26ZT> [hereinafter Tobias, *Selecting District Judges*]

correspondingly instituted negligible endeavors to identify, recruit, scrutinize, tap, and confirm ethnic minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ) choices; and counsel who have acquired invaluable, less conventional experience, namely defending manifold people accused of crime, although robustly increasing diversity clearly strengthens the federal bench.<sup>6</sup>

The Grand Old Party chamber majority practically eliminated the vaunted “blue slip” policy—which allowed legislators from numerous states that faced open court of appeals posts to stop or delay manifold nominees in Obama’s eight years—without convincing reasons for the dramatic alteration.<sup>7</sup> Senate Judiciary Committee hearings lacked sufficient rigor, because the GOP majority did not canvass instructive American Bar Association evaluations and ratings and encourage robust nominee probing in panel hearings or deliberations before most votes.<sup>8</sup> These systems yielded jurists

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(describing the substantial dependence of virtually all modern presidents on the ABA and contrasting Trump’s approach); *see also* Ann E. Marimow & Matt Viser, *Biden Moves Quickly to Make His Mark on the Federal Courts After Trump’s Record Judicial Appointments*, WASH. POST (Feb. 3, 2021, 7:00 AM), <https://perma.cc/M6M5-NBZJ> (explaining Biden’s hybrid approach of consulting the ABA but not waiting for the bar association’s valuable evaluations and ratings).

6. *See* Tobias, *Keep the Federal Courts Great*, *supra* note 3, at 210–11; *see* Tierney Sneed, *Inside Democrats’ Quest to Nominate Judges Who Break the Ex-Prosecutor Mold*, CNN (July 28, 2021), <https://perma.cc/ST7L-78WL> (last updated July 30, 2021, 4:15 PM) (stressing Biden’s efforts to nominate and confirm ex-public defenders, civil rights attorney, and labor lawyers); *see also* Carl Tobias, *President Donald Trump’s War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531, 547–48 (2019) (“President Trump has nominated and confirmed the fewest ethnic minority and LGBTQ candidates since the Reagan Administration . . .”) [hereinafter Tobias, *Trump’s War on Federal Judicial Diversity*]; *infra* notes 12, 31, 35–36, 38–39 and accompanying text.

7. *See* Carl Tobias, *Senator Chuck Grassley and Judicial Confirmations*, 104 IOWA L. REV. ONLINE 31, 54–55 (2019) [hereinafter Tobias, *Senator Chuck Grassley*]; *see* Tobias, *Selecting District Judges*, *supra* note 5, at 4 & nn.19–20 (explaining the century-old traditional “blue slip” policy).

8. *See* 163 CONG. REC. S8,022–24 (daily ed. Dec. 14, 2017) (statements of Senators Dianne Feinstein & Patrick Leahy) (revealing the lack of GOP engagement in the confirmation process); *see also* Tobias, *Keep the Federal Courts Great*, *supra* note 3, at 214–15 (“Many hearings appeared to be rushed, while the sessions lacked that degree of care which is appropriate for nominees who will enjoy life tenure to decide compelling questions when confirmed.”). The changes allowed controversial nominees to win relatively close committee



who essentially resolved numbers of complicated disputes in ways that facilitated Trump's political efforts or who later thwarted President Biden's initiatives, especially matters which implicated decision-making by appellate court and district court judges with chambers located in the United States Court of Appeals for the Fifth Circuit.<sup>9</sup>

## II. BIDEN ADMINISTRATION JUDICIAL SELECTION

Across the 2020 campaign and since his presidential election, Biden has specifically pledged to completely rectify Trump judicial appointments' deleterious impacts.<sup>10</sup> On March 30, 2021, the chief executive announced that the White House would send the initial cohort of picks: eleven accomplished, centrist nominees who reflect the diversity requisites evaluated previously in this essay, which significantly improve judicial decision-making by providing different perspectives, limit biases that undermine federal court litigation, and enhance public confidence about courts by having the tribunals resemble

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

9. See Tobias, *Keep the Federal Courts Great*, *supra* note 3, at 219, 223 (observing how Trump-appointed judges allowed Trump projects like building a border wall without congressional authorization and undermined Biden's policies); *infra* note 52 and accompanying text; see generally PEOPLE FOR THE AMERICAN WAY, CONFIRMED JUDGES, CONFIRMED FEARS: THE CONTINUING HARM CAUSED BY CONFIRMED TRUMP FEDERAL JUDGES (2019), <https://perma.cc/S2Q2-CACL> (PDF); Matt Ford, *Republicans Keep Turning to the Same Texas Judges to Block Biden's Policies*, NEW REPUBLIC (Mar. 15, 2022), <https://perma.cc/K2FU-BXR9>; Ian Millhiser, *How Republicans Rigged Texas's Federal Courts Against Biden*, VOX (last updated Aug. 10, 2022, 7AM), <https://perma.cc/4PWM-RUGR>; Jon Skolnik, *Biden's Biggest Enemy: Trump Judges*, SALON (Feb. 19, 2022, 1:42 AM), <https://perma.cc/8T2K-4NFV>; Tierney Sneed, *Why Texas Is a Legal Graveyard for Biden Policies*, CNN (Mar. 3, 2022), <https://perma.cc/N9E3-EZZT> (last updated Mar. 3, 2022, 5:01 AM); Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373 (2021).

10. See Tobias, *Senator Chuck Grassley*, *supra* note 7, at 33–34 (defining “regular order” as the Senate rules, norms, and customs that the Grand Old Party Senate majority promised to restore after recapturing the Senate majority during the 2014 midterm elections but significantly undercut); 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/GAK2-9ADE> (pledging to continue nominating qualified and skilled candidates). I rely in this section on Collins, *supra* note 2.

the American public.<sup>11</sup> The submissions included the first Muslim district court nominee and three Black women for court of appeals vacancies; two of the latter candidates had competently represented many defendants accused with crimes, even though Trump in fact neglected to muster *one* Black appellate court nominee.<sup>12</sup> Pertinent in this essay are five of President Biden's suggested candidates whom the chamber evaluated initially, because the persons exemplify the seventy additional 2021 prospects and significant numbers of the forty-six 2022 candidates whom he has nominated.<sup>13</sup>

In late March 2021, President Biden announced that the executive branch would send the candidates, although the process which resulted in the nominations had commenced substantially earlier.<sup>14</sup> In 2020, as the Democratic Party nominee, Biden assembled a transition selection group, which

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11. See *infra* notes 31, 38 and accompanying text; see also Tobias, *Keep the Federal Courts Great*, *supra* note 3, at 222 (analyzing diversity's benefits); Adrian Blanco, *Biden Who Pledged to Diversify the Supreme Court, Has Already Made Progress on Lower Courts*, WASH. POST (Jan. 27, 2022, 4:48 PM), <https://perma.cc/LXG5-G2M7>.

12. See *Hearing on Nominees Before the S. Comm. on the Judiciary*, 117th Cong., at 15:00–15:55 (2021), <https://perma.cc/5JJP-G2AT> [hereinafter *Hearing on Nominees*] (statement of Sen. Durbin, Chair, S. Comm. on the Judiciary). Trump managed to nominate no Black candidate to the fifty-four appellate court vacancies, which his administration filled. *Id.* at 21:33–21:40; Lynn Sweet, *Jackson-Akiwumi Would Be Rare Judge Who Was a Public Defender Highlighted at Her Senate Hearing*, CHI. SUN-TIMES (Apr. 28, 2021, 9:06 PM), <https://perma.cc/8LVR-554X>; see *infra* note 30.

13. Biden augmented the initial slate of experienced, mainstream, diverse nominees, who are this paper's focus, with twenty-four additional packages of similar appellate court and district court nominees. See White House, Off. of the Press Sec'y, *President Biden Announces Intent to Nominate 11 Judicial Candidates*, Mar. 30, 2021; *id.*, *Second Slate of Judicial Nominees*, Apr. 29, 2021. The Biden Administration issued the Third and Fourth Slates on May 12 and June 15 and the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-First, Twenty-Second, Twenty-Third, Twenty-Fourth and Twenty-Fifth Rounds on June 30, Aug. 5, Sept. 8, Sept. 30, Nov. 3, Nov. 17, Dec. 15, and Dec. 23, 2021, Jan. 19, Feb. 2, 22, Apr. 13, 27, May 25, June 15, June 29, July 12, 13, 14, 29, and August 9, 2022.

14. I depend substantially in this paragraph and below on Collins, *supra* note 2; Marimow & Viser, *supra* note 5; Ian Millhiser, *Biden's Fight to De-Trumpify the Courts, Explained*, VOX (July 31, 2021, 8:00 AM), <https://perma.cc/D2E8-8RKQ>; and Zoe Tillman, *Trump Transformed the Federal Courts. Here's How Biden Could*, BUZZFEED NEWS (Dec. 17, 2020, 4:26 PM), <https://perma.cc/6FAS-FNSB>.

permitted him to comprehensively survey myriad highly capable, mainstream, diverse picks before the January inauguration. By the summer of 2020, the appointments team had collected and effectuated constructive appointments practices, while the staff members identified numerous extremely competent potential submissions. After Biden defeated Trump in the November election, the formal transition process started. Most relevantly, Dana Remus, the White House Counsel, penned senators a December letter, requesting that politicians from states with openings tender very qualified, centrist people for nominees who manifest the diversity facets before January 20, 2021.<sup>15</sup>

In April, Biden officially nominated the five remarkable choices whom the Senate approved over June.<sup>16</sup> They encompassed two prominent, mainstream, Black women, United States District Court for the District of Columbia Judge Ketanji Brown Jackson as a United States Court of Appeals for the District of Columbia Circuit nominee, and experienced, well respected federal court advocate Candace Jackson-Akiwumi for the United States Court of Appeals for the Seventh Circuit.<sup>17</sup> President Obama had marshaled Judge Jackson's district court appointment in 2013 while the chief executive had considered the aspirant for the Supreme Court empty position to which Obama ultimately nominated United States Court of Appeals for the District of Columbia Circuit Chief Judge Merrick

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15. Remus accorded home state senators forty-five days to submit recommendations for new vacancies which subsequently materialized. Letter from Dana Remus, White House Counsel Designate, to U. S. Sens. (Dec. 22, 2020), <https://perma.cc/N865-HZ3U>; see Madison Alder & Courtney Rozen, *Biden Deadline for Judicial Nominees Challenges Senate Democrats*, BLOOMBERG (Apr. 23, 2021, 4:26 AM), <https://perma.cc/6JGJ-AJ8B> (referencing the extremely tight timeline and the difficulties that it presented); Jennifer Bendery, *Biden Team Tells Senators To Send Him Judicial Nominees ASAP*, HUFFINGTON POST (Dec. 30, 2020, 2:47 PM), <https://perma.cc/6DUL-6DKH> (reporting on Biden's plan to fill vacancies quickly and with diverse nominees).

16. See Press Release, White House, Off. of the Press Sec'y, Nominations Sent to the Senate (Apr. 19, 2021), <https://perma.cc/M6BK-ZN64> [hereinafter Press Release, Nominations Sent to Senate]; see *infra* note 49.

17. Carl Hulse, *Panel Approves First Biden Judicial Picks Over G.O.P. Opposition*, N.Y. TIMES (May 20, 2021), <https://perma.cc/K4X7-GBQC> (last updated June 8, 2021) (emphasizing the approval of Judges Ketanji Brown Jackson and Candace Jackson-Akiwumi).

Garland, and President Biden tendered her in 2022 to replace United States Supreme Court Justice Stephen Breyer for whom Jackson had productively clerked.<sup>18</sup> She is an excellent, highly regarded, centrist, diverse, jurist, who had also clerked for preeminent trial level and court of appeals judges, worked for three distinguished law firms over a number of years, served as a member of the United States Sentencing Commission for multiple years, and was a very competent, rigorous Federal Public Defender from 2007 until 2010.<sup>19</sup> Judge Jackson-Akiwumi had profitably clerked for multiple renowned trial level and Fourth Circuit jurists, litigated with the Skadden, Arps law firm during a couple years, and quite capably represented individuals accused of federal crimes across one decade.<sup>20</sup>

President Biden concomitantly named three experienced, mainstream district court nominees. Zahid Quraishi, who became the initial Muslim Article III Judge, was a highly qualified New Jersey lawyer, receiving elevation from a United States Magistrate Judge post in the District of New Jersey.<sup>21</sup>

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18. See *Confirmations*, *supra* note 3, (listing Judge Jackson's nomination and confirmation). For evaluations of the legality and the propriety of the Grand Old Party Senate majority's refusal to even consider Obama's distinguished Supreme Court nominee United States Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland during a presidential election year, see generally Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53 (2016) and Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089 (2017).

19. See Press Release, Nominations Sent to Senate, *supra* note 16 (announcing Judge Jackson as a nominee to the D.C. Circuit). United States Court of Appeals for the District of Columbia Circuit Judge Jackson has succeeded Justice Breyer. See Carl Hulse, *On Eve of Confirmation Hearing, G.O.P. Steps Up Attacks on Jackson*, N.Y. TIMES (Mar. 20, 2022), <https://perma.cc/SJ56-VNB8> (last updated Mar. 21, 2022) (anticipating the nomination for Judge Jackson to succeed Justice Breyer); Patricia Mazzei & Charlie Savage, *For Ketanji Brown Jackson, View of Criminal Justice Was Shaped By Family*, N.Y. TIMES (Jan. 31, 2022), <https://perma.cc/Z8VN-KCA8> (last updated Mar. 22, 2022) (documenting past connections with Justice Breyer).

20. See Press Release, Nominations Sent to Senate, *supra* note 16 (announcing the nomination of Judge Jackson-Akiwumi); see also Sweet, *supra* note 12 (detailing the qualifications of Judge Jackson-Akiwumi).

21. See Press Release, Nominations Sent to Senate, *supra* note 16 (reporting the nomination of U.S. Magistrate Judge Zahid Quraishi); see also

Regina Rodriguez, who had efficaciously litigated with a national law firm for many years following her competent service as a federal prosecutor, captured approval to the District of Colorado.<sup>22</sup> Julien Neals, who had long been a widely respected municipal jurist in Newark and a Bergen County administrator, mustered confirmation to the District of New Jersey.<sup>23</sup> President Obama had marshaled the selection of Neals and Rodriguez during the concluding two years of his presidency, although the GOP majority refused to seriously consider either nominee and dozens more of that chief executive's submissions who required confirmation votes.<sup>24</sup> The three Biden district nominees' hearing testimony merits comparatively little assessment here, because this piece's focus is the appeals courts, while Quraishi, Rodriguez, and Neals did confront merely a "few friendly questions from [Senators Richard] Durbin (D-IL) and [Cory] Booker (D-NJ)."<sup>25</sup>

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Azi Paybarah, *U.S. Senate Confirms First Muslim Federal District Judge*, N.Y. TIMES (June 11, 2021), <https://perma.cc/D384-PVBK> (praising the groundbreaking nomination and nominee). *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/3KA8-WSN8> (exploring some Muslim Americans' distrust in Judge Zahid Quraishi).

22. See Press Release, Nominations Sent to Senate, *supra* note 16 (announcing the nomination of Regina Rodriguez); *see also* Nicholas Fandos, *Senate Confirms First Biden Judges, Beginning Push to Rebalance Courts*, N.Y. TIMES (June 8, 2021), <https://perma.cc/9L4V-ZD3W> (discussing the strategy leading to the confirmation); Justin Wingenter, *U.S. Senate Confirms New Colorado Federal Judge After Five-Year Wait*, DENVER POST (June 8, 2021, 2:33 PM), <https://perma.cc/AW6H-L282> (last updated June 8, 2021, 2:34 PM) (similarly announcing the confirmation of the Denver lawyer).

23. See Press Release, Nominations Sent to Senate, *supra* note 16 (reporting the nomination of Judge Julien Neals); *see also* Fandos, *supra* note 22 (detailing Judge Julien Neals' qualifications).

24. See Press Release White House, Off. of the Press Sec'y, Presidential Nominations Sent to the Senate (Feb. 26, 2015), <https://perma.cc/S9SX-XATU> (documenting Julien Neals nomination); Press Release White House, Off. of the Press Sec'y, Presidential Nominations Sent to the Senate (Apr. 28, 2016), <https://perma.cc/GH6J-7EMN> (documenting Regina Rodriguez nomination); *see also* Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 18–19 (2017) (advocating for renomination of nominees previously blocked by Grand Old Party majorities); *infra* note 55 and accompanying text.

25. Andrew Kragie, *Biden's Appellate Picks Tackle GOP Queries on Race, Politics*, LAW360 (Apr. 28, 2021, 6:54 PM), <https://perma.cc/ZP8N-NEU5>; *see also* *Hearing on Nominees*, *supra* note 12, at 3:32:52–4:07:50 (encapsulating

When assuming the role of Judiciary Committee Chair, Durbin solemnly promised to strongly, efficiently, and fairly pilot the committee and to cultivate robust, superb committee member participation. However, Durbin warned GOP senators that procedures and conventions similar to practices and customs which Republicans had employed to facilitate the confirmation of Trump judicial nominees would govern Democrats *and* Republicans. For instance, Chair Durbin admonished that Democrats would retain the GOP “circuit exception” to the blue slip policy which the committee had created with little persuasive substantiation under the leadership of then-Chair Senator Chuck Grassley (R-IA).<sup>26</sup>

The Biden Administration carefully and speedily compiled the applicable candidate paperwork while formally mustering ten nominees’ delivery for the Senate in mid-April.<sup>27</sup> The panel swiftly extended comprehensive questionnaires to the nominees

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the brief questioning of the district judge nominees). Grand Old Party members asked the district nominees no questions, because they focused on the appellate court nominees. See Carl Hulse, *Senate Begins Considering Diverse Slate of Biden Judicial Nominees*, N.Y. TIMES (Apr. 28, 2021), <https://perma.cc/GP4K-3RCD> (last updated June 8, 2021) (documenting the focus on the appellate nominees) [hereinafter Hulse, *Diverse Slate of Biden Judicial Nominees*].

26. Durbin admonished that he would end GOP “ability to block district court nominees through the arcane ‘blue slip’ process, [if it] were obstructing nominations without legitimate grounds.” Carl Hulse, *Durbin, New Judiciary Chair, Warns Republicans on Blocking Judges*, N.Y. TIMES (Mar. 1, 2021), <https://perma.cc/YJL4-4X4Z>; see Marianne Levine, *Senate Dems Take a Page from GOP in Judicial Nominee Battles*, POLITICO (Feb. 17, 2021, 4:37 PM), <https://perma.cc/W7PE-QD4G> (last updated Feb. 17, 2021, 5:38 PM) (signaling that Democrats were not planning “to reinstate the obscure tradition they had defended”); Mike DeBonis, Seung Min Kim, & Rhonda Colvin, ‘A Singular Focus’: Durbin is Determined to Make History as He Works to Confirm Biden’s Supreme Court Pick, WASH. POST (Feb. 21, 2022, 5:01 PM), <https://perma.cc/4PSS-HBRR> (detailing Durbin’s self-described bipartisan efforts); *supra* note 8.

27. Biden nominated District of Columbia Superior Court Judge Florence Pan to the United States District Court for the District of Columbia vacancy created by Judge Jackson’s elevation to the United States Court of Appeals for the District of Columbia Circuit. Press Release, White House, Off. of the Press Sec’y, Nominations Sent to the Senate (June 15, 2021), <https://perma.cc/2NPD-ER7L>. The President concomitantly nominated District Judge Pan to the D.C. Circuit vacancy created by Judge Jackson’s elevation to the United States Supreme Court. White House, Off. of the Press Sec’y, Nominations Sent to the Senate (May 25, 2022), <https://perma.cc/D7R2-7MCE>.

who rapidly marshaled extremely impressive answers.<sup>28</sup> The committee accorded citizens notice of the April 28 hearing one week before the panel convened the session and of the identities for the multiple nominees mustered two days later.<sup>29</sup>

Chair Durbin perceptively began the April hearing by claiming that the session was “historic,” as every prospect is a nominee of color, representing considerable salient “demographic and professional diversity.”<sup>30</sup> Each court of appeals nominee offered comprehensive, lucid, and robust contributions. A few GOP members stressed both nominees’ criminal defense work possibly attempting to undercut them. For example, Senator Tom Cotton (AR) aggressively contested Judge Jackson’s prior representation of a “terrorist” who had been imprisoned at Guantanamo Bay, yet she persuasively observed that the federal court assigned her to serve as counsel

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28. See generally S. COMM. ON THE JUDICIARY, 117TH CONG., KETANJI BROWN JACKSON QUESTIONNAIRE FOR JUDICIAL NOMINEES (2021), <https://perma.cc/4UQA-2KBF>; S. COMM. ON THE JUDICIARY, 117TH CONG., KETANJI BROWN JACKSON RESPONSES TO QUESTIONS FOR THE RECORD (2021), <https://perma.cc/N8YN-KNWN>; S. COMM. ON THE JUDICIARY, 117TH CONG., CANDACE JACKSON-AKIWUMI QUESTIONNAIRE FOR JUDICIAL NOMINEES (2021), <https://perma.cc/W3XH-YNSG>; COMM. ON THE JUDICIARY, 117TH CONG., WRITTEN QUESTIONS FOR CANDACE JACKSON-AKIWUMI (2021), <https://perma.cc/DF3F-V86G>; S. COMM. ON THE JUDICIARY, 117TH CONG., JULIEN XAVIER NEALS QUESTIONNAIRE FOR JUDICIAL NOMINEES (2021), <https://perma.cc/2K2Q-TEQ2>; S. COMM. ON THE JUDICIARY, 117TH CONG., JULIEN XAVIER NEALS RESPONSES TO QUESTIONS FOR THE RECORD (2021), <https://perma.cc/FGW3-2BU4>; S. COMM. ON THE JUDICIARY, 117TH CONG., ZAHID QURAIISHI RESPONSES TO QUESTIONS FOR THE RECORD (2021), <https://perma.cc/736T-RKRA>; S. COMM. ON THE JUDICIARY, 117TH CONG., REGINA RODRIGUEZ RESPONSES TO QUESTIONS FOR THE RECORD (2021), <https://perma.cc/X575-DMRK>.

29. S. Judiciary Comm., Hearing Advisory, Senate Judiciary Comm. To Hold Hearing on First Slate of White House Judicial Nominations, Apr. 23, 2021. When Republican Senators enjoyed a panel majority the prior six years, the Grand Old Party rarely posted the names of nominees before the week of the hearings. See Tobias, *supra* note 3, at 211–17 (detailing the evolution of the confirmation process under GOP leaders).

30. Durbin generously praised President Biden’s diversity initiatives, while the Chair criticized and lamented former President Trump’s failure to recommend a single Black circuit nominee: “It is a sad reality that four years of [Trump and a Republican] Senate did not expand diversity on our federal courts.” *Hearing on Nominees*, *supra* note 12, at 21:16–21:24; see Tobias, *supra* note 7, at 60–61 (“The significant number of district court and judicial emergency vacancies and the comparatively few minority jurists whom Trump appointed pinpoint the need to enhance diversity.”).

and defend the individual.<sup>31</sup> Senator John Cornyn (TX) asked Judge Jackson how race could affect her court determinations, but the jurist essentially responded that she was completely independent and directly based every case resolution on its peculiar law and facts.<sup>32</sup> When GOP members correspondingly sought Jackson’s perspectives about enlarging the High Court and relating to Supreme Court decisions, the nominee properly and respectfully demurred.<sup>33</sup>

Candace Jackson-Akiwumi cautiously replied to numbers of distinctly analogous queries.<sup>34</sup> For instance, Senator Grassley, who had become the Judiciary Committee Ranking Member, questioned the nominee about her defense of a “criminal” prosecuted for weapons trafficking,<sup>35</sup> yet Jackson-Akiwumi repeated her cogent admonition that she was dutifully providing the kind of thorough representation to which defendants are entitled in the federal criminal justice regime.<sup>36</sup> When

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31. *Hearing on Nominees*, *supra* note 12, at 1:55:30–1:55:58. Judge Jackson elaborated that conducting criminal defense work enhances her resolution of numerous cases. *See* Hulse, *Diverse Slate of Biden Judicial Nominees*, *supra* note 25 (explaining the advantages for federal judges’ service of a defense-oriented background); *see also* 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/HNU6-DPWH> (documenting the praise that Judge Jackson had received across the aisle for her work on the “commission that shapes federal sentencing policies”). *But see* Jennifer Bendery, *Republicans Keep Attacking Biden Nominees for Being Good Lawyers*, HUFFINGTON POST (Mar. 9, 2022, 1:24 PM), <https://perma.cc/7BYT-RYC6> (last updated Mar. 17, 2022) (documenting criticism from the Republican members of Congress, especially alleging that she was “soft on crime”); Carl Hulse, *As Jackson Faces Senators, Her Criminal Defense Record Is a Target*, N.Y. TIMES (Mar. 16, 2022), <https://perma.cc/L6U6-3FUM> (describing the challenges that Judge Jackson faced because of her record).

32. *Hearing on Nominees*, *supra* note 12, at 1:25:20–1:27:02; *see supra* notes 12, 25, 31 and accompanying text.

33. *See supra* notes 12, 25, 31 and accompanying text; *see also* EXEC. ORDER NO. 14,023, 86 FED. REG. 19,569 (Apr. 9, 2021) (establishing the Presidential Commission on the Supreme Court of the United States). *See generally* PRES. COMM. ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT (2021).

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

35. *Hearing on Nominees*, *supra* note 12, at 1:05:30–1:07:21; *see also* Hulse, *Diverse Slate of Biden Judicial Nominees*, *supra* note 25 (describing the interaction between Sen. Grassley and nominee Jackson-Akiwumi).

36. Jackson-Akiwumi elaborated: “I stand by [the] oath I took as an attorney, which is to represent zealously everyone who requires federal



Republican senators probed race's impact on appeals court determinations, she emphatically responded: "I don't believe that race will play a role in the type of judge I would be, if confirmed."<sup>37</sup> However, Jackson-Akiwumi specifically contended that "demographic diversity of all types" performs a major role, because varied sorts of diversity enhance "public confidence in our courts" and expand citizen acceptance of tribunal resolutions' legitimacy.<sup>38</sup> The nominee did concomitantly recognize that increased diversity fosters role modeling for numerous young students and counsel, who aspire to develop public service careers.<sup>39</sup> When multiple GOP lawmakers sought her perspectives about the optimal complement of Supreme Court Justices and numbers of Supreme Court precedents, she respectfully declined to answer most of their queries.<sup>40</sup>

The Chair accorded the committee one week to posit multiple questions for the record and the nominees seven days to compose replies.<sup>41</sup> The five nominees deftly afforded prompt,

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representation in our federal courts. That's how our system works best." *Hearing on Nominees*, *supra* note 12, at 1:07:21–1:08:20.

37. See *Hearing on Nominees*, *supra* note 12, at 1:27:06; see also Hulse, *Diverse Slate of Biden Judicial Nominees*, *supra* note 25 (recounting her response to the question regarding how "race would influence how [she] would interpret the law"); *supra* note 33 (Judge Jackson's analogous perspectives).

38. See *Hearing on Nominees*, *supra* note 12, at 1:27:15 – 1:27:44; see also Hulse, *Diverse Slate of Biden Judicial Nominees*, *supra* note 25 (summarizing Jackson-Akiwumi's perception of judges' ethnicity and impacts on public confidence in the federal judicial system); Sweet, *supra* note 12 (describing Jackson-Akiwumi's diverse background and qualifications).

39. See *Hearing on Nominees*, *supra* note 12, at 1:27:45 – 1:28:06; see also Hulse, *Diverse Slate of Biden Judicial Nominees*, *supra* note 25 (quoting Jackson-Akiwumi on the aspirational paths leading from public service); Sweet, *supra* note 12 (explaining the role of increased diversity on aspiring legal scholars).

40. See *Hearing on Nominees*, *supra* note 12, at 2:00:10–2:00:55; see also Hulse, *Diverse Slate of Biden Judicial Nominees*, *supra* note 25 (stating that Jackson-Akiwumi declined to comment on the expansion of the Supreme Court). Jackson-Akiwumi similarly declined to express views on legal issues that she might address as a judge. *Hearing*, *supra* note 33 (highlighting Judge Jackson's similar response).

41. See *Hearing on Nominees*, *supra* note 12. Questions for the record should be rigorous and usually treat issues that are not addressed in the hearing or for which senators lacked time to probe nominees or for which members pursue elaboration by nominees.

complete, accurate responses.<sup>42</sup> During a subsequent Executive Business Meeting, the committee rigorously discussed particular issues that were relevant to effective appellate court and district court service and voted on the nominees.<sup>43</sup> Grassley declared that the GOP must hold appeals court “nominees to a high standard of constitutionalism, regardless of how impressive their credentials are [,but] unless a circuit nominee can show me [acute commitment] to the Constitution as originally understood, I do not think [the person] should be confirmed.”<sup>44</sup> The Ranking Member also expressly claimed that Judge Jackson had failed to persuasively confirm whether she actually believed in a “living Constitution,” although the jurist had specifically refused to endorse the notion in her earlier trial level confirmation process,<sup>45</sup> and Durbin sharply castigated this approach, derogatorily characterizing the proposition as a completely inappropriate “litmus test.”<sup>46</sup> Moreover, Grassley expressed critical reservations over 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,” even though the candidate

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42. Ketanji Brown Jackson, Candace Jackson-Akiwumi, Julien Neals, Zahid Quraishi, and Regina Rodriguez, Responses to Questions for the Record, May 5, 2021; *see also* sources cited *supra* note 28 (providing citations to the five nominees’ responses to senators’ questions for the record).

43. *See* S. COMM. ON THE JUDICIARY, 117TH CONG., EXECUTIVE BUSINESS MEETING (2021), <https://perma.cc/7FFL-MMKD> [hereinafter EXECUTIVE BUSINESS MEETING]; *see also* Carl Hulse, *Senate Panel Approves First Biden Judicial Picks Over G.O.P. Opposition*, N.Y. TIMES (May 20, 2021), <https://perma.cc/H5U2-YHZ3> (elaborating on the Senate Judiciary Committee’s approval of Judge Ketanji Brown Jackson and Candace Jackson-Akiwumi during the Executive Business Meeting).

44. *See* EXECUTIVE BUSINESS MEETING, *supra* note 43, at 40:15—40:48; *see also* Hulse, *supra* note 43.

45. *See* EXECUTIVE BUSINESS MEETING, *supra* note 43, at 41:22—41:36; *see also* Responses of Ketanji Brown Jackson Nominee to Be United States District Judge for the District of Columbia District to the Written Questions of Senator Tom Coburn, M.D., Dec. 12, 2012.

46. *See* S. COMM. ON THE JUDICIARY, 117TH CONG., *Hearing on Nominees*, June 9, 2021; *id.*, EXECUTIVE BUSINESS MEETING, June 10, 2021. Grassley replied that “any originalist would admit that you take into consideration all of the constitutional amendments.” *See Hearing, supra*; *see also* Madison Alder, *Durbin Pushes Back On Originalism As Test For Judges*, BLOOMBERG LAW (June 9, 2021), <https://perma.cc/5WF8-BJ2X>.

incessantly reassured the legislators that she would dutifully adhere to every relevant precedent.<sup>47</sup>

Because the choices whom President Biden nominated are esteemed submissions, who clearly and thoroughly replied to plenty of complicated queries, they definitely merited strong panel approval. Nevertheless, merely *two* Republican members cast ballots for Judge Jackson and *one* could support Jackson-Akiwumi's candidacy, yet larger numbers of GOP members helped advance in committee district court picks Neals, Quraishi, and Rodriguez.<sup>48</sup> Therefore, Durbin rapidly moved all of the nominees onto the floor.

Majority Leader Chuck Schumer (NY) attempted to expeditiously schedule confirmation debates and votes for the well qualified, mainstream, diverse nominees, but the GOP refused unanimous consent to have ballots on each of the talented prospects. Therefore, Schumer invoked cloture that ended debate when a Senate majority agreed; the Majority Leader then promptly scheduled robust nominee confirmation debates and the chamber votes were quite positive.<sup>49</sup>

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47. See *Hearing on Nominees*, *supra* note 12. Senator Grassley remarked that he thought the “district nominees seemed well qualified” and the Ranking Member voted for each. See *EXECUTIVE BUSINESS MEETING*, *supra* note 43; see also Hulse, *supra* note 43; Andrew Kragie, *Senators Advance Judge Jackson, 4 More Biden Judicial Picks*, LEXIS LAW360 (May 20, 2021), <https://perma.cc/2QNB-7GCP>; *supra* note 33 (providing Judge Jackson's analogous perspectives).

48. The Judiciary Committee approval ballots respecting the initial five nominees were 13-9 (Jackson), 12-10 (Jackson-Akiwumi), 15-6 (Neals), 19-3 (Quraishi), and 17-5 (Rodriguez). See *EXECUTIVE BUSINESS MEETING*, *supra* note 43; see also *supra* note 47 and accompanying text, *infra* notes 49-50, 73 and accompanying text (documenting relatively similar Grand Old Party senator voting patterns regarding the confirmation ballots related to President Biden's initial five nominees).

49. For senators' cloture votes on President Biden's initial five appellate court and district court nominees, see 167 CONG. REC. S3,943-44, S3,953 (daily ed. June 7, 2021) (Neals); *id.* at S3,967-72 (daily ed. June 8, 2021) (Rodriguez); *id.* at S4,024-26 (daily ed. June 10, 2021) (Quraishi); *id.* at S4,027 (daily ed. June 10, 2021) (Jackson); *id.* at S4,710-11, S4,723 (daily ed. June 23, 2021) (Jackson-Akiwumi). For Senate confirmation debates and votes on the initial five nominees, see *id.* at S3,969-71 (daily ed. June 8, 2021) (Neals); *id.* at S3,975 (daily ed. June 8, 2021) (Rodriguez); *id.* at S4,027-29, S4,032 (daily ed. June 10, 2021) (Quraishi); *id.* at S4,504-07, S4,511 (daily ed. June 14, 2021) (Jackson); *id.* at S4,735, S4,748 (daily ed. June 24, 2021) (Jackson-Akiwumi); see also Fandos, *supra* note 22; Hulse, *supra* note 17.

## III. IMPLICATIONS

In short, President Biden and the remarkably narrow Democratic Senate majority honored their respective constitutional responsibilities by nominating and confirming the first two appeals court jurists and eleven other court of appeals judges throughout the chief executive's initial year; the jurists promise to be excellent, centrist, diverse judges, while Biden tapped five more analogous district court candidates in the first package and seventy other similar appeals court and district court nominees across the initial twelve months.<sup>50</sup> The administration carefully nominated through ample consultation of home state lawmakers, and the politicians were extremely responsive to White House Counsel Dana Remus' December 2020 importuning related to diversity.<sup>51</sup> Senators, who represent jurisdictions in which court vacancies materialized, vigorously pursued, examined, and interviewed capable, mainstream, diverse aspirants while sending them for consideration by President Biden, who expeditiously nominated, and the chamber quickly, cautiously, and fairly considered, questioned, discussed, and confirmed the strong, moderate, diverse nominees.

For example, the President appointed many court of appeals selections by assigning them crucial priority and robustly cultivating home state politicians, who speedily proffered accomplished, mainstream candidates; this White House and the legislators were more attentive to the regular order concept and consistently transparent during the nomination and confirmation processes than former President Trump and the two GOP chamber majorities in both the 115th

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50. See U.S. CONST. art. II, § 2, cl. 2. For the additional eleven appellate court and district court appointees and eighty similar lower court nominees in President Biden's first year as well as a Justice and thirty-two analogous lower court judges and forty-six nominees so far in Biden's second year, see JUDICIAL VACANCIES, Current Judicial Vacancies, Confirmations (2021-22), *supra* note 2. For the other five nominees in the first cohort, see Mar. 30, 2021 White House Press Release, *supra* note 13.

51. See Saul Loeb, *Biden Taps Veteran Team to Guide Historic Supreme Court Nomination*, CNBC (Jan. 28, 2022), <https://perma.cc/WG56-F5BQ> (explaining the roles of the individuals in the Biden Administration who helped President Biden to nominate judicial candidates).

and the 116th Congress.<sup>52</sup> Biden and numerous Democratic senators have correspondingly promoted radically increased ethnic, gender, sexual orientation, ideological, and experiential appellate court diversity.

Trump and each of the Republican Senate majorities created records for approving conservative, accomplished, youthful court of appeals jurists, who comprise thirty percent of the appellate courts' active judges; these court of appeals members could well serve over multiple decades, while quite a

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52. President Biden and the White House Counsel Office prioritized appellate courts, because the tribunals encompass smaller judicial complements, include multiple states, and articulate considerable important policy, while Trump has substantially packed the appellate courts with extraordinarily conservative, accomplished, youthful jurists. *See supra* notes 3–9 and accompanying text; *see also* Carl Tobias, *How Biden Began Building Back Better the Federal Bench*, 78 WASH. & LEE L. REV. ONLINE 31, 47–48 (2021) [hereinafter Tobias, *How Biden Began Building Back Better*] (prioritizing district court emergencies); Carl Hulse, *After Success In Seating Federal Judges, Biden Hits Resistance*, N.Y. TIMES (Dec. 5, 2021), <https://perma.cc/W7LE-R29E> (documenting Republican resistance to Biden's appointments process after his administration's early selection success); Madison Alder, *Midterms Pressure Senate, Biden On Appellate Appointments*, BLOOMBERG L. (June 29, 2022), <https://perma.cc/ZF84-LXBP> (predicting that President Biden's appellate court appointments will slow and halt early during the 2022 midterm election year); Russell Wheeler, *Biden's Judicial Appointments: Still Very Diverse But Numbers May Be Falling Off*, BROOKINGS INST. (June 2, 2022), <https://perma.cc/Y7PC-XETY> (providing a relatively similar prediction); Alex Bolton, *McConnell Vows To Be 'Picky' With Biden Nominees If GOP Wins the Senate*, THE HILL (June 27, 2022), <https://perma.cc/CH82-JQYW> (predicting the Republican opposition that President Biden and the razor-thin Democratic Senate majority will confront in the 2022 midterm elections).

President Biden and the Democratic Senate majority also better protected candidate privacy than did former President Trump and both of the Republican Senate majorities in the 115th and 116th Congress. *See supra* notes 8, 11, 26, 29 and accompanying text; *see also* Harper Neidig, *Biden Speeds Ahead On Installing Judges*, THE HILL (Aug. 8, 2021), <https://perma.cc/3VL5-6RX7> (explaining Biden's expeditious and ambitious approach to federal judicial nominations).

Privacy issues may concomitantly explain why the first five appellate court and district court nominee slates included no openly LGBTQ nominee, but subsequent packages include and trumpet those nominees. *See In a Record-Breaking Year for Judicial Nominations, the Biden Administration Fell Short on LGBTQ+ Representation*, LAMBDA LEGAL (Feb. 1, 2022), <https://perma.cc/HCT8-86UP> (criticizing the lack of progress that Biden has made on LGBTQ judicial nominees); *infra* note 64 and accompanying text; *see, e.g.*, Sixth, Tenth, & Sixteenth Rounds, *supra* note 13.

few have already published strikingly problematic rulings which facilitated Trump's efforts that the Republican White House premised on questionable legal support or which undercut Biden's concerted initiatives to move the nation in comparatively positive directions.<sup>53</sup> Moreover, Trump and Republican senators insistently ignored or deemphasized particular "blue" state trial court and emergency vacant positions that remained significant plus diverse confirmations and nominations that substantially plummeted. The courts of appeals realize seven current unfilled posts, fourteen jurists have indicated that the judges will assume senior status pending the confirmation of their successors, merely four of the twenty-one openings do presently lack nominees,<sup>54</sup> while nominating and confirming Judge Jackson as the replacement for Justice Breyer devoured considerable resources that would otherwise have been devoted to filling appellate court and district court vacancies. Democrats also possess a tiny Senate majority which they could forfeit in the November midterm elections. Therefore, the last portion of this piece reviews

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53. See *supra* note 9 and accompanying text; see also Robert Barnes, *Emboldened Supreme Court Majority Shows It's Eager for Change*, WASH. POST (June 25, 2022), <https://perma.cc/MF2P-SJT5> (explaining the recent decisions by the conservative 6-3 Supreme Court majority to address issues deemed important to conservatives, especially Republican members of Congress and individuals who vote for them); Gary Gerstle, *Mitch McConnell Greatly Damaged US Democracy With Quiet, Chess-Like Moves*, GUARDIAN (Aug. 15, 2022), <https://perma.cc/E68K-TWB3> (contending that McConnell's "chess-like skills of political strategizing proved crucial to fashioning a right wing Supreme Court willing to overturn *Roe v. Wade* and to destabilize American politics and American democracy in the process"); Carl Hulse, *Mitch McConnell's Court Delivers*, N.Y. TIMES (June 27, 2022), <https://perma.cc/AR8Y-BLFH> (describing the current conservative majority makeup of the Supreme Court and the culture war issues that are at stake to be considered); Charlie Savage, *Abortion Ruling Poses New Questions About How Far Supreme Court Will Go*, N.Y. TIMES (June 24, 2022), <https://perma.cc/K3KL-SZ9A> (questioning whether the recent overturn of abortion rights by the Supreme Court marks the beginning of a rightward shift on issues that directly touch intimate personal choices).

54. One appellate court member, Fifth Circuit Judge Gregg Costa, announced in February 2022 that he would resign from the appeals court in August; sixty-six district court openings presently remain unfilled. JUDICIAL VACANCIES, Current Vacancies, Future Vacancies (2022), *supra* note 2; see Avalon Zoppo, *5th Circuit Judge Gregg Costa to Return to Private Practice, Saying He's 'Better Suited To Being An Advocate'*, ALM L. (Feb. 9, 2022), <https://perma.cc/R7NQ-HNHW>.

solutions that President Biden and the chamber may explore instituting to nominate and confirm many well qualified, centrist, diverse appeals court nominees.<sup>55</sup>

#### IV. SUGGESTIONS

Biden already capitalizes on several mechanisms which have perennially facilitated the efficient nomination and confirmation of superb, mainstream, diverse appellate court judges. For instance, the chief executive elevates numerous possibilities from lower federal, and various tiers of state, courts<sup>56</sup> and masterfully renames President Obama's distinguished district court nominees whom the Republican Senate majority denied consideration throughout the concluding two years of his tenure, while President Biden has carefully evaluated, nominated, and confirmed several of his Republican predecessor's nominees whom the chamber did not appoint over the Trump presidency.<sup>57</sup> United States Court of Appeals for the Ninth Circuit Judge Lucy Koh exemplifies the first and second precepts, while Judges Gabriel Sanchez and Holly Thomas, her multiple prominent colleagues; astute United States Court of Appeals for the Second Circuit Judges Alison Nathan plus Beth Robinson; highly experienced United States Court of Appeals for

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55. See *infra* Part IV.

56. These jurists include federal district court judges and United States Magistrate Judges as well as state Supreme Court, intermediate appellate court, and trial court, judges. See, e.g., *supra* notes 21, 25, 39, 43, 48–50 and accompanying text (documenting the elevation of Judge Zahid Quraishi from a federal magistrate judgeship to a federal district court judgeship in the district of New Jersey). See generally Elisha Savchak et al., *Taking It to the Next Level: The Elevation of District Court Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478, 485–90 (2006) (describing how and why Presidents and Senates follow the tradition of elevating district court judges to the appellate courts).

57. For examples of President Obama's district court nominees whom President Biden renamed, see *supra* notes 23–25, 39, 43, 48–50 and accompanying text (documenting the renomination of Julien Neals by President Biden following his previous nomination by President Obama); *supra* notes 22, 24–25, 39, 43, 48–50 and accompanying text (documenting the renomination of Regina Rodriguez by President Biden following her previous nomination by President Obama). For illustrations of Trump nominees, including Eastern District of Michigan Judge Stephanie Dawkins Davis and Eastern District of New York Judge Hector Gonzales, whom President Biden renominated and the Senate confirmed, see *infra* notes 61–62.

the Sixth Circuit Judge Stephanie Dawkins Davis whom former President Trump had wisely appointed to the Eastern District of Michigan; and stellar United States Court of Appeals for the District of Columbia Circuit Judge Jackson trenchantly illustrate elevation.<sup>58</sup>

President Biden ought to keep applying the dynamic constructs, because the initial classification of people have already captured appointment, have accumulated consummate expertise, and have compiled easily accessible records; those nominees in the second category proceed swiftly, because they directly afford compelling American Bar Association evaluations and ratings, Federal Bureau of Investigation-developed background checks, and comprehensive Judiciary Committee assessments, which merely need easily-accomplished updating.<sup>59</sup> In fact, former President Trump renominated a significant number of President Obama's well qualified, mainstream, unconfirmed 2016 district court prospects, and the Republican chamber majorities smoothly and expeditiously approved fifteen.<sup>60</sup> Therefore, President Biden might contemplate renominating Trump and Obama designees whom the Senate was not able to confirm by actively consulting home state officers and marshaling finely-calibrated analyses of nominee competence, vacancies' magnitude and length, plus election timing. However, this concept has significantly greater relevance to district court empty slots for which President Biden

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58. See *supra* notes 16–19, 30–33, 43–45, 48–50, *infra* note 59 and accompanying text (explaining how Judge Jackson was successfully elevated from the U.S. District Court to the U.S. Court of Appeals and from the D.C. Circuit to the United States Supreme Court); JUDICIAL VACANCIES, Confirmations (2021-22), *supra* note 2; *infra* notes 62, 65–67 and accompanying text (providing additional information regarding these and several other judges).

59. See Tobias, *Keep the Federal Courts Great*, *supra* note 3, at 224–227 (exploring potential measures to support to successful judicial confirmations in the future); see also Tobias, *How Biden Began Building Back Better*, *supra* note 52, at 47–48 (documenting the success that President Biden has attained in his previous judicial confirmations). The United States Senate has now appointed Judge Jackson to the United States Sentencing Commission, the United States District Court for the District of Columbia District, the United States Court of Appeals for the District of Columbia Circuit, and the United States Supreme Court.

60. See Tobias, *How Biden Began Building Back Better*, *supra* note 52, at 47 & n.55; see also Tobias, *supra* note 24, at 18–19.



has recently proposed and confirmed several well qualified, mainstream individuals whom Trump had nominated, but the chamber failed to confirm,<sup>61</sup> because appellate court jurists articulate substantial policy that covers more than one jurisdiction and numbers of candidates and confirmees whom Trump selected lack various diversity phenomena.<sup>62</sup>

Another renowned measure that President Biden carefully and solicitously practices, which derives from his earlier senatorial and vice presidential experiences, is constant, assiduous consultation of home state politicians. The administration consistently seeks perspectives, and even cautiously invites specific nominee recommendations, from the public officials. This President and modern chief executives traditionally accord politicians somewhat less deference regarding appellate court openings, because the tribunals distinctly include multiple states and enunciate considerably greater policy. Nonetheless, Biden assertively consults significant numbers of politicians, who represent jurisdictions that experience appeals court vacancies. For instance, the

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61. See Eleventh & Thirteenth Rounds, *supra* note 13 (documenting that President Biden renominated Eastern District of New York nominee Hector Gonzalez and Southern District of New York nominee Jennifer Rearden, whom Trump nominated but the Senate has yet to confirm); Donald Shaw, *Biden Renominates Trump Pick and GOP Donor Jennifer Rearden As A Federal Judge*, SLUDGE (Jan. 20, 2022), <https://perma.cc/VV6G-2EKV>; Jennifer Bendery, *Progressive Groups Are Trying to Sink One of Biden's Judicial Nominees*, HUFFINGTON POST (Mar. 10, 2022), <https://perma.cc/KP58-GT2E> (describing the efforts that different progressive organizations implemented to prevent Biden's judicial nomination of Jennifer Rearden—a former Trump nominee); JUDICIAL VACANCIES, Current Judicial Vacancies, Confirmations (2021-22), *supra* note 2 (documenting that President Biden has renominated no Trump California district court nominee, but the Senate has confirmed Gonzalez and will probably confirm Rearden when the chamber returns from the August Recess); see also S. COMM. ON THE JUDICIARY, 117TH CONG., EXECUTIVE BUSINESS MEETING, Apr. 4, 2022 (documenting the Judiciary Committee approval of Rearden).

62. Trump left one 2021 appellate court vacancy and fifty-two district court vacancies at the conclusion of the Republican's tenure, while his administration packed the appeals courts with extraordinarily conservative, accomplished, youthful judges. See *supra* notes 3–9 and accompanying text. But see Fourteenth Round, *supra* note 13 (documenting President Biden's elevation of his predecessor's highly experienced, mainstream, diverse Eastern District of Michigan appointee Dawkins Davis); JUDICIAL VACANCIES, Current Confirmations (2022), *supra* note 2 (documenting Dawkins Davis' United States Court of Appeals for the Sixth Circuit Senate confirmation).

President has apparently cultivated all of the California and New York senators.<sup>63</sup> However, Biden enjoyed peculiarly less cooperation in states like Wyoming, Texas, and Kansas which possess two GOP senators, and concerted administration approaches respecting one appellate court open post with Tennessee Republican Senators Marsha Blackburn and Bill Hagerty actually proved controversial when they alleged that the White House minimally contacted each legislator ahead of the highly capable nominee's submission.<sup>64</sup>

President Biden appropriately created and continues to follow certain substantial priorities. Most important were nominating and confirming accomplished, moderate, diverse candidates for numerous appeals court positions or many emergencies. Illuminating are exceptional Second Circuit Judges Nathan and Robinson plus Supreme Court Justice Jackson, all of whom had served as exceptionally competent, mainstream jurists for practically a decade,<sup>65</sup> and Jennifer

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63. For President Biden's nomination of all of the appellate court and district court recommendations submitted by New York Democratic Senators Schumer and Kristen Gillibrand and expeditious, smooth Senate confirmation of practically all of their suggestions, but for nomination and confirmation of fewer appellate court and district recommendations submitted by California Democratic Senators Dianne Feinstein and Alex Padilla, see JUDICIAL VACANCIES, Current Judicial Vacancies, Confirmations (2021-22), *supra* note 2.

64. *See id.*; Twenty-Fifth Round, *supra* note 13 (documenting a protracted United States Court of Appeals for the Tenth Circuit vacancy that has long been assigned to Kansas which materialized on March 15, 2020 that lacked a nominee until August 9, 2022 when President Biden nominated Assistant United States Attorney Jabari Wamble); Tenth Round, *supra* note 13 (documenting President Biden's nomination of United States Court of Appeals for the Sixth Circuit Tennessee nominee Andre Mathis); S. COMM. ON THE JUDICIARY, 117TH CONG., *Hearing on Nominees*, Jan. 12, 2022 (documenting the Mathis hearing); Hulse, *supra* note 52 (describing the Mathis hearing); Paul Waldman, *One of Biden's Biggest Achievements Is Going Largely Ignored*, WASH. POST (Jan. 14, 2022), <https://perma.cc/DLX8-CBX8> (lauding President Biden's exceptionally successful judicial appointments process while acknowledging the Democratic majority's approach to the 'blue-slip' tradition for expediting the judicial nomination process in the Senate by honoring the 2017 "circuit exception" that the Republican Senate majority had created); *supra* note 26 and accompanying text (documenting Democrats' decision to retain the circuit exception which Republicans had fashioned).

65. Judge Robinson who ably served on the Vermont Supreme Court and Judge Nathan who capably served on the Southern District of New York became the first two openly lesbian appellate court jurists, and Judge Jackson competently served on the United States District Court for the District of

Sung, one more impressive Ninth Circuit appointee.<sup>66</sup> President Biden correspondingly approved highly experienced, moderate intellectual property lawyer Tiffany Cunningham, who efficaciously serves as the initial Black jurist on the United States Court of Appeals for the Federal Circuit.<sup>67</sup> The chief executive appropriately prioritizes courts of appeals with multiple or extended vacancies, although a few tribunal openings lack nominees. Indeed, a majority of the appeals courts - including the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Tenth Circuits - has addressed, or may confront in the near future, this precise complication, so that President Biden might want to redouble efforts, proffer improved assistance and even contemplate nominating without awaiting home state politicians' recommendations of choices.<sup>68</sup>

Most ideas - but not all constructs - on which President Biden and the Democratic Senate majority presently depend can

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Columbia and the United States Court of Appeals for the District of Columbia Circuit. First, Sixth, & Tenth Rounds, *supra* note 13; JUDICIAL VACANCIES, Confirmations (2021-22), *supra* note 2; *see* Madison Alder, *Historic LGBT Confirmation Gives Biden Second Circuit Flip*, BLOOMBERG L. (Nov. 1, 2021), <https://perma.cc/K9FL-4DUK> (documenting and describing the confirmation of Beth Robinson as the first openly lesbian to serve as a federal appellate judge); Ben Weiser, *The Judge In Ghislaine Maxwell's Trial Spent Wednesday in Washington*, N.Y. TIMES (Dec. 16, 2021), <https://perma.cc/TJ7D-SH44> (documenting and describing Judge Alison Nathan's confirmation hearing before members of the Senate Judiciary Committee).

66. *See* JUDICIAL VACANCIES, Confirmations (2021-22), *supra* note 2 (documenting the four Ninth Circuit judges whom Biden confirmed); *see also* Blanco, *supra* note 11 (documenting Biden's numerous nominations of appointees to the federal bench, who are diverse in terms of ethnicity, gender, sexual orientation, ideology, and experience); Bob Egelko, *Senate Confirms L.A. Judge to Ninth Circuit, Continuing Biden's Streak of Diverse Appointments*, S.F. CHRON. (Jan. 20, 2022), <https://perma.cc/C23U-287Y> (recognizing the appointment and confirmation of Holly Thomas, an African American woman, to the Ninth Circuit).

67. *See* JUDICIAL VACANCIES, Confirmations (2021), *supra* note 2; *see also* Perry Cooper, *Judge Cunningham Chimes in During First Federal Circuit Hearing*, BLOOMBERG L. (Nov. 1, 2021), <https://perma.cc/K5V6-2ECG> (describing Judge Cunningham's first appearance on the Federal Circuit bench).

68. A substantial number of appellate court judges have made their assumption of senior status contingent upon Senate confirmation of successors. *See* JUDICIAL VACANCIES, Current Vacancies, Future Vacancies (2022), *supra* note 2; *see also supra* note 54; Tobias, *supra* note 52, at 49 (discussing similar circumstances in California and New York district courts).

reinstate or maintain the diversity phenomena and the regular order constituents. For example, the chief executive declines to wait on thorough American Bar Association inquiries and cogent ratings before the White House dutifully suggests nominees, because the examinations and rankings putatively contribute to delayed nominations and confirmations,<sup>69</sup> although the bar association canvasses and ratings could prove informative while they may limit embarrassment for nominees, candidates, senators and Biden and the selection of designees who lack the requisite competence to serve as exceptional federal court judges.<sup>70</sup>

The Democratic President and Senate majority can assess reinstating the policies related to the employment of American Bar Association material; of appellate court blue slips that did perform rather efficaciously in the Obama Administration, despite Republican institution of changes that benefited Trump; and of restrictions to a single witness the number who can testify at one court of appeals hearing, even though Durbin constantly rejects the application of different requirements for the Democratic and Republican Parties.<sup>71</sup> *After* the chief executive and the chamber have dutifully reimplemented numbers of diversity constituents, which former President

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69. See Marimow & Viser, *supra* note 5; see also Charlie Savage, *Biden Won't Restore Bar Association's Role in Vetting Judges*, N.Y. TIMES (Feb. 11, 2021), <https://perma.cc/LH8R-66TE> (explaining Biden's decision to limit somewhat the official role of the ABA when inquiring into the qualifications of judicial nominees). *But see* EXECUTIVE BUSINESS MEETING, *supra* note 43 (documenting how Durbin awaits ABA evaluations and ratings before the committee discusses nominees' qualifications and votes on them).

70. President Obama refused to nominate any candidate who received a not qualified American Bar Association rating, but Trump nominated ten nominees who received that rating and the Senate appointed eight. The ratings, therefore, can alert selection participants to potential concerns regarding nominees, even those whom the Senate ultimately confirms. Tobias, *Keep the Federal Courts Great*, *supra* note 3, at 208, 227.

71. See S. COMM. ON THE JUDICIARY, 117TH CONG., EXECUTIVE BUSINESS MEETING, Jan. 20, 2022 (discussing procedures and effective rules for conducting the judicial confirmation process and Durbin's admonition that similar requirements must govern Democrats and Republicans); see also *Hearing on Nominees*, *supra* note 64 (documenting the Mathis hearing in which Durbin repeated that he was opposed to different requirements for Democrats and Republicans). Appellate court slips promote White House consultation with home state senators and protect senator selection prerogatives. See *supra* notes 8, 11, 26 and accompanying text.

Trump and both of the Republican Senate majorities violated, ignored, or downplayed, reliance on constricted American Bar Association information, the nascent appeals court exception, and panel testimony from more than a single appellate court nominee during hearings might warrant careful investigation and possible change.<sup>72</sup>

Republicans and Democrats should collaborate to enlarge bipartisanship in federal judicial appointments, potentially through rethinking and diligently recalibrating salient problematic conduct. For instance, abundant Grand Old Party Senate members essentially pursue lock step voting, although a few Republican legislators definitely reject this, particularly with district court candidates; illustrative are Lindsey Graham (SC), who has been supporting a number of President Biden's appellate court nominees in committee and regarding confirmation and other Republican members, who did cast panel and confirmation ballots for President Biden's first three district court nominees.<sup>73</sup> Grand Old Party senators also foster excessive, unnecessary delay by requesting cloture votes on all of the chief executive's judicial choices.<sup>74</sup> Republicans as well may scrutinize whether insisting that nominees espouse originalist constitutional perspectives has somehow devolved into an unwarranted litmus test or requirement and whether the GOP members believe that certain nominees who have

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72. See Dahlia Lithwick, *Biden Borrowed the Federalist Society's Tactics. Good*, SLATE (Mar. 30, 2021), <https://perma.cc/9W9Z-YHJY>; see also *supra* note 26 and accompanying text; *infra* note 80 (restoring diversity facets should precede restoring regular order).

73. See Burgess Everett, *Why Lindsey Graham Is Going All-In on Biden SCOTUS Pick*, POLITICO (Feb. 2, 2022), <https://perma.cc/GFC8-PPWD> (explaining Senator Graham's support for Biden judicial nominees, especially Judge Michelle Childs); see also *supra* notes 43, 48–50 and accompanying text; Tobias, *How Biden Began Building Back Better*, *supra* note 52, at 48 (documenting fewer Grand Old Party votes for district judges other than Biden's first three district nominees). See generally Jo Becker & Danny Hakim, *Tap Dancing with Trump: Lindsey Graham's Quest for Relevance*, N.Y. TIMES (Aug. 15, 2021), <https://perma.cc/N3VT-EVPH>. But see Jordain Carney, *Graham Goes Quiet on Biden's Supreme Court Pick*, THE HILL (Mar. 15, 2022), <https://perma.cc/JE45-QJ6L> (demonstrating Graham's reluctance to publicly speak about his private meeting with Judge Jackson and whether he would support her Supreme Court confirmation).

74. See, e.g., *supra* note 49. Democrats rather similarly treated Trump judicial nominees. See Tobias, *Keep the Federal Courts Great*, *supra* note 3, at 215.

dutifully represented defendants accused of crime actually cannot resolve suits properly.<sup>75</sup>

President Biden and Democratic legislators may wish to explore whether, in their justifiable haste to counter numerous adverse effects on court of appeals diversity, which Trump and two Republican chamber majorities inflicted by appointing numbers of extremely conservative, young appellate jurists, Democrats impose strictures that compromise minority party ability to comprehensively survey nominees and undercut certain regular order components. For example, ahead of the committee hearing for Biden's initial nominees, the current minority party distinctly argued that Graham, as Chair of the Judiciary Committee, expressly refused to include any nominee tendered for the United States Court of Appeals for the District of Columbia Circuit on hearing panels which encompassed a second appellate court nominee.<sup>76</sup> Democrats explicitly responded that the Grand Old Party had demolished the tradition of providing very few sessions to review more than one appellate court nominee and only with the minority's permission by dramatically convening *fifteen* hearings for pairs of Trump nominees absent minority party concurrence.<sup>77</sup> Republicans also castigated Democrats who arranged one hearing for multiple nominees who could hold significant judicial and executive branch offices when committee members enjoyed only a couple of minutes to analyze or probe knotty issues, while Cornyn pejoratively ridiculed this session as a "drive-by hearing [which]

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

76. See Andrew Kragie, *Judge Jackson, Four Other Judicial Picks Set For Senate Hearing*, LAW360 (Apr. 23, 2021), <https://perma.cc/EXR2-XS7M>; see also JUDICIAL VACANCIES, Confirmations (2019-20), *supra* note 2 (documenting two D.C. Circuit nominee hearings in Graham's tenure).

77. The Grand Old Party lacked minority party approval to conduct hearing panels with two appeals court witnesses. Durbin has convened seven hearings which featured two appellate court nominees, and the Chair may conduct more analogous sessions following the August Recess, because Biden has nominated six appeals court prospects who await hearings and minimal time remains to process the nominees in the 117th Congress. *Hearing on Nominees*, *supra* note 12; S. COMM. ON THE JUDICIARY, 117TH CONG., *Hearings on Nominees*, June 9, 2021, Feb. 15, Mar. 2, June 22, July 27, 2022; see Tobias *Keep the Federal Courts Great*, *supra* note 3, at 213 (documenting that Democrats convened *three* hearings which reviewed two appellate court nominees in Obama's *eight* years in special circumstances and with Grand Old Party permission).

trivializes our constitutional responsibility.”<sup>78</sup> Another Republican member expressly accused Durbin of rudely stopping nominee discussions to record committee approval for a single executive branch candidate and deployed that incident as an excuse to place floor holds on numbers of President Biden’s United States Attorney nominees.<sup>79</sup> Durbin and his majority party colleagues addressed the Republican criticisms by stating that Democrats were relying substantially on numerous precedents which the Grand Old Party majority had systematically deployed throughout Trump’s presidency; these notions acutely illuminate the tension between carefully reinstating the diversity components and comprehensive regular order.<sup>80</sup>

Finally, Democrats and Republicans might wish to comprehensively evaluate and completely implement solutions that promote the collaborative nomination and confirmation of accomplished, moderate, diverse jurists while ending or restricting the incessant “confirmation wars” and the counterproductive downward spiraling appointments process characterized by sharp partisanship, gaming the selection process, and stunning politicization. One salutary, contemporary example on which the Republican and Democratic Party lawmakers seemingly agree <sup>81</sup> is the appellate tribunals’

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78. See S. COMM. ON THE JUDICIARY, 117TH CONG., *Hearing on Nominees*, May 26, 2021; U.S. CONST., *supra* note 50 (documenting the advice and consent duty); see also Andrew Kragie, *DOJ Nominee on Track As GOP Blasts ‘Defense Judges’*, LAW360 (May 26, 2021), <https://perma.cc/442U-36VN>.

79. Chair Durbin apologized to Senator Cotton for any confusion that Democrats created, contending that Democrats and he had followed regular order. EXECUTIVE BUSINESS MEETING, *supra* note 43; see 167 CONG. REC. S8,950–51 (daily ed. Dec. 7, 2021) (providing Chair Durbin’s explanation of the voting strategy for the nomination of Associate Attorney General Vanita Gupta, his criticism of Cotton for delaying confirmation votes on United States Attorney nominees because of his dispute with Durbin that was unrelated to those nominees, and Cotton’s response to Durbin which purportedly explained Cotton’s behavior); Waldman, *supra* note 64 (describing the process that both Democratic and Republican senators have adopted to fast track nominations).

80. See *supra* notes 72, 76–79 and accompanying text. This problematic tension’s best resolution - that President Biden and the Democratic Senate majority are pursuing - is to initially restore diversity and subsequently restore regular order, both of which phenomena Trump severely undercut.

81. See U.S. H.R. COURTS, INTELLECTUAL PROPERTY, & THE INTERNET JUDICIARY SUBCOMM., *Hearing on the Need For New Lower Court Judgeships: 30 Years in the Making*, Feb. 24, 2021; see also Thomas Berry, *The U.S. Needs*

compelling need for significantly greater judicial resources that may permit the bench's felicitous satisfaction of the central duty to promptly, economically, and fairly resolve mammoth case loads,<sup>82</sup> although Congress has not adopted a comprehensive bill which authorizes substantially greater numbers of appellate court or district court judgeships over the last thirty-two years.<sup>83</sup> A primary reason for this critical standoff has been the determined reluctance of the party that lacks the White House to create significantly more court seats which the opposing party President would correspondingly fill.<sup>84</sup>

One solution for this conundrum is a "bipartisan judiciary" which allows the political party without the chief executive to suggest a rather small percentage of candidates.<sup>85</sup> President Biden as well as Democratic and Republican senators could astutely tether bipartisan courts and legislation which prescribes seventy-seven district court, and merely two court of appeals, new positions.<sup>86</sup> This solution would apply Judicial

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*More Federal Judges*, WALL STREET J. (Mar. 9, 2021), <https://perma.cc/5HSQ-F7UJ> (explaining the unusually bipartisan agreement about the compelling need for numerous additional federal judges to manage the substantial case load).

82. See FED. R. CIV. P.1 (2022) (establishing the civil procedure rules governing the United States District Courts, including that of a "just, speedy, and inexpensive determination" of judicial proceedings). 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) (evaluating Federal Rule 1).

83. See Federal Judgeships Act, Pub. L. No. 101-650, title II, Dec.1, 1990, 104 Stat. 5098; see also *Hearing*, *supra* note 81.

84. See Rose Wagner, *When Nominating Judges Gets More Political, Filling Seats Requires Strategy*, COURTHOUSE NEWS SERVICE (Feb. 7, 2022), <https://perma.cc/Z7NE-N6T5> (describing the strategic considerations regarding congressional authorization of additional judgeships and filling the judicial vacancies that result as well as the history underlying this issue).

85. For recent relevant practice and numerous specific operational details, see Michael Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003) (comparing different operational strategies that various Presidents have applied in nominating judicial candidates and fostering Senate confirmations); Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L. J. ONLINE 2051, 2056—58 (2016) (suggesting that a bipartisan judicial model would enable the political party that does not control the White House to suggest a comparatively small portion of judicial candidates).

86. See *supra* notes 81–82 and accompanying text; U.S. JUD. CONF., REP. OF THE PROCEEDINGS OF THE U.S. JUDICIAL CONF. 23–24 (2021); see also S.



Conference of the United States recommendations for the Senate and House, which the federal court policymaking arm grounds in conservative work and case load estimates that duly grant the federal courts resources which are necessary to furnish justice.<sup>87</sup> Combining a bipartisan judiciary and seventy-seven district court posts can reap significant benefits. Each individually, but especially in combination, might halt or slow the nomination and confirmation processes' deterioration and supply (1) both of the political parties realistic incentives to cooperate, (2) jurists who offer numbers of diversity elements, and (3) courts judicial resources which they desperately need.<sup>88</sup>

However, only two appellate court judgeships, which the Judicial Conference presently recommends and which one bill suggests, currently seem demonstrably insufficient to remedy the appellate court problems, because court of appeals jurists treat massive dockets with comparatively limited resources.<sup>89</sup> Administrative Office of the United States Courts empirical data show that numerous appeals courts may not afford crucial

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2535, 117th Cong. (2021) (providing the recent comprehensive legislation which drafters premised on the Judicial Conference recommendations for Congress). Additional legislation would create more than 200 district court positions, yet no appellate court posts, but the Grand Old Party will probably not support the bills, as Biden would fill many of those new judgeships. *See* H.R. 4885 & H.R. 4886, 117th Cong. (2021); H.R. 320, 117th Cong. (2021) (proposing two United States Court of Appeals for the Ninth Circuit judgeships but making passage contingent on splitting the appellate court, which is a proposition that Democratic President Biden and the Senate majority would clearly oppose); *see also* Madison Alder, *Congress Weighs First District Court Expansion Since 1990*, BLOOMBERG LAW (Aug. 9, 2021), <https://perma.cc/NX6W-TZY6> (examining the bipartisan JUDGES Act that would create more judgeships and additional court openings).

87. *See supra* note 86. If the Grand Old Party strongly opposes bipartisan courts, institution might commence during 2023 or 2025, so that neither Republicans nor Democrats will know which may capture election in 2022 or 2024 and capitalize on winning to game the selection process.

88. *See supra* notes 81–87 and accompanying text. The judicial filibuster might appear to have some relevance for contemporary federal judicial selection. However, Democrats' razor-thin majority and their promise to revive the diversity constituents - a critical element of which is retaining fifty votes for nominee cloture and confirmation - mean that the party is extremely unlikely to change this filibuster soon. Retaining fifty votes to restore diversity can potentially undermine regular order. *See supra* note 80 and accompanying text (affording possible resolution of the tension between restoring regular order and revitalizing numerous diversity constituents).

89. *See supra* notes 86–87 and accompanying text.

appellate justice regarding certain important parameters, and specific procedural shortcuts' pervasiveness means that the triage system has disparate negative effects in particular courts of appeals.<sup>90</sup> For example, some tribunals provide comparatively small percentages of oral arguments, and even fewer numbers of published opinions, which presently comprise salient measures of appellate justice.<sup>91</sup> Plentiful litigants, judges, counsel, scholars, and members of Congress have long contended that protracted resource deficiencies necessitate the institution of a multi-tiered appellate justice regime.<sup>92</sup> Accordingly, each house of Congress might want to dutifully scrutinize, and cautiously pass, a statute which authorizes numerous court of appeals slots, because Congress's infusion of judicial resources, especially by introducing additional court positions, will clearly support tribunal endeavors which could better deliver justice on appeal.<sup>93</sup>

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90. See Merritt McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. U. L. REV. 1137, 1175—82 (2022) (analyzing how the distribution of appellate court resources has created disparate impacts particularly in communities of color and poorer communities); Xiao Wang, *In Defense of (Circuit) Court-Packing*, 119 MICH. L. REV. ONLINE 32, 38—42 (2020) (explaining how the increase of appellate court judges should proportionally match that of the population whom the judges serve to reduce disparate impacts).

91. See JUDICIAL BUSINESS OF THE UNITED STATES COURTS, Tbl. B-10, United States. Courts of Appeals - Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending Sept. 30, 2021 (documenting that appellate courts afford twenty-two percent of appeals oral arguments); *id.*, Tbl. B-12, Type of Opinion or Order Filed in Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending Sept. 30, 2021 (documenting that appellate courts afford fourteen percent of appeals published opinions).

92. See *supra* notes 86, 90–91 and accompanying text; see, e.g., THOMAS BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEAL* (1994); WILLIAM RICHMAN & WILLIAM REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* (2012).

93. See *supra* notes 86, 90, 92 and accompanying text. Bipartisan courts appear less effective in states which have comparatively small numbers of appellate court judges that have vacancies every two decades, but augmenting court of appeals judges responds to this complication. See Tobias, *Keep the Federal Courts Great*, *supra* note 3, at 231 (discussing how different states and delegations will have varying circumstances, needs and procedures).

## CONCLUSION

President Joe Biden concertedly started implementing his pledge to eliminate or reduce former President Trump appellate court selection's deleterious impacts with confirmations and nominations of preeminent, mainstream submissions whom the first eighteen appeals court jurists and the identical number of additional strong, moderate court of appeals nominees epitomize. The President and the chamber should abundantly capitalize on their productive initial approaches by continuing to nominate excellent, moderate candidates, and the Senate must keep rigorously processing and seating impressive judges who profoundly enhance venerable appellate court diversity in terms of ethnicity, gender, sexual orientation, ideology, and experience.