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## Filling Lower Court Vacancies in Congress' Lame Duck Session

Carl Tobias

*University of Richmond - School of Law*, [ctobias@richmond.edu](mailto:ctobias@richmond.edu)

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# COMMENTARIES

## FILLING LOWER COURT VACANCIES IN CONGRESS’ LAME DUCK SESSION

*Carl Tobias* \*

### TABLE OF CONTENTS

INTRODUCTION .....	48
I. TRUMP ADMINISTRATION JUDICIAL SELECTION .....	50
II. BIDEN ADMINISTRATION JUDICIAL SELECTION .....	52
III. IMPLICATIONS OF BIDEN AND TRUMP JUDICIAL SELECTION.....	60
IV. SUGGESTIONS REGARDING THE LAME DUCK SESSION .....	61
A. <i>The Confirmation Process and the Senate             Calendar</i> .....	61
B. <i>Other Specific Recommendations</i> .....	64
CONCLUSION .....	67

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## INTRODUCTION

In this midterm election year of 2022, the nation's divided political parties are in a battle royale to win the exceedingly close Senate majority. One important explanation for the fight is that the party which assumes the next Senate majority will necessarily have considerable power to affect the confirmation of federal judges. For example, during Donald Trump's presidency, Republicans controlled the Senate; therefore, the chief executive and the upper chamber proposed and confirmed fifty-four accomplished, extremely conservative, young appeals court, and 174 district court, jurists. The Republican White House and Senate majority confirmed judges by rejecting or deemphasizing the rules and conventions that have long governed the selection process and concomitantly provided highly capable, mainstream jurists who improve ethnic, gender, sexual orientation, ideological, and experiential court diversity. Former President Trump and the Republican chamber in the 116th Congress approved fourteen lower court judges promptly *after* Joe Biden had defeated Trump. These phenomena have jeopardized federal court ideological balance, citizen regard for the judicial selection process, and federal court diversity. Notwithstanding which party realizes a majority in this November's midterm elections, the present slim Democratic Party majority needs to rapidly convene a lame duck session, which rigorously canvasses and confirms myriad jurists after the imminent elections. Those factors deserve review to comprehend how President Biden and Senate lawmakers can best promote appointments throughout the upcoming lame duck session.

The first Part considers how Trump's 2016 White House victory and Grand Old Party ("GOP") retention of the chamber then and two years subsequently clearly enabled the President and the Senate to pack the judiciary with ideologically conservative, non-diverse jurists. Shortly ahead of capturing the presidency, Biden surmised that Trump and the GOP chambers had rendered the bench "out of whack," and he pledged to vanquish that striking conundrum by approving diverse judges.<sup>1</sup>

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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), <https://www.nydailynews.com/news/politics/us-elections-government/ny-supreme-court-biden-commission-20201022-4vack3ecibadnkk76ldnkv6dky-story.html> [https://perma.cc/43M7-XZ53]; Annie Linskey, *Biden Squeezed on the Supreme Court, Promises a Commission to Consider Changes*, WASH. POST (Oct. 22, 2020), <https://www.washingtonpost.com/politics/biden-promises-commission-on-overhauling/>

Part two chronicles how President Biden and the Senate majority honor this promise by instituting efforts that set records which increase talented, centrist, diverse jurists. For example, the White House assiduously consults senators from states in which vacant posts arise, while the lawmakers carefully pursue, evaluate, and submit numerous remarkably qualified, moderate, diverse candidates. Biden also capitalizes on a number of lessons that he gleaned from roles as a Judiciary Committee member and Chair and from vice presidential service during President Barack Obama's tenure.

Part three peruses numerous implications of former President Trump's selection endeavors over his four years and Biden's responses during his first half term. The Part detects that the GOP confirmed many accomplished, conservative nominees, who altered the bench's storied ideological balance—particularly on the Supreme Court and appellate courts—while eviscerating the appointments regime, which had yielded numerous dynamic, mainstream nominees throughout much of the last half century. Most critical, Biden and the chamber in fact approved thirteen fine, centrist appellate jurists, eclipsing the record over a President's first year compiled by former President Trump and the GOP Senate majorities.<sup>2</sup> The profound confirmation success of Biden and the Democratic chamber majority dutifully respected their pledges to address impacts of Trump's federal court confirmations and enhance numerous diversity requisites. In short, despite the concerted efforts of President Biden and the Democratic chamber majority, openings might remain acute this November, principally because GOP politicians have not always cooperated.

Therefore, the last Part of this article proffers numerous ideas for how President Biden and the Democratic Senate majority in the 117th Congress can proceed after the chamber midterm elections. Because lame duck former President Trump and the Republican Senate majority in the 116th Congress persisted, in flagrant disregard of longstanding customs and requirements, to confirm one appellate court and thirteen district court judges once Biden and the

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g-supreme-court/2020/10/22/4465ead6-121d-11eb-ba42-ec6a580836ed\_story.html [https://perma.cc/HQX8-XUNN]. See generally PRESIDENTIAL COMM'N ON SUP. CT. U.S., FINAL REPORT (2021).

2. U.S. Courts, *Judicial Vacancies*, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/confirmation-listing> [https://perma.cc/7ZVA-ANEL] (Nov. 16, 2022) (table of confirmations of the 117th Congress); John P. Collins, *Judging Biden*, 75 SMU L. REV. FORUM 150 (2022).

country's voters emphatically stopped Trump's presidency, Biden and the Senate need to comprehensively approve preeminent, centrist jurists across the lame duck session, regardless of which party actually controls a Senate majority after the November 8 mid-terms.

## I. TRUMP ADMINISTRATION JUDICIAL SELECTION

Across the 2016 presidential campaign, Trump vowed to expeditiously nominate and confirm able, youthful, ideologically conservative federal court judges and honored that promise by confirming and mustering United States Supreme Court Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett with myriad analogous appellate courts, and comparatively fewer, similar district court prospects.<sup>3</sup> Trump broke appellate court records in his opening year, 2017, with twelve, eighteen during 2018, and twenty across 2019.<sup>4</sup>

The 2020 presidential and chamber elections followed one term in which former President Trump and both GOP Senate majorities directly confirmed three accomplished, exceedingly conservative, young Justices, fifty-four prominent, analogously conservative, appeals court judges, and 170-plus relatively similar trial level jurists by violating, changing, or deemphasizing vaunted norms and conventions that have perennially sustained the approval of preeminent, moderate appellate court and trial level judges.<sup>5</sup> For instance, Trump rarely consulted numerous senators from a plethora of jurisdictions which confronted open slots, even though the politicians were intrinsically and considerably more familiar with strong picks than executive branch officials.<sup>6</sup> Trump also constricted American Bar Association ("ABA") involvement with federal court selection, even though Presidents in office after Dwight Eisenhower, save George W. Bush and Trump, comprehensively invoked ABA evaluations and rankings when tendering

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3. See sources cited *supra* note 2; see also Russell Wheeler, *Judicial Appointments in Trump's First Three Years: Myths and Realities*, BROOKINGS INSTITUTION (Jan. 28, 2020), <https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-realities/> [https://perma.cc/3XK6-E63U].

4. Carl Tobias, *Keep the Federal Courts Great*, 100 B.U.L. REV. ONLINE 196, 205 & n.24 (2020). President John F. Kennedy confirmed eleven. 163 CONG. REC. S8,022-24 (daily ed. Dec. 14, 2017) (statements of Sen. Feinstein & Sen. Leahy).

5. See U.S. Courts, *supra* note 2 (archive of judicial vacancies for 2020). I rely substantially in this paragraph and this section on Tobias, *supra* note 4, at 204–20; Collins, *supra* note 2, at 151.

6. Tobias, *supra* note 4, at 206–07; see Collins, *supra* note 2, at 156–57.

candidates, while Obama and Biden, who served as that chief executive's vice president, deftly avoided tapping people who received not qualified ratings.<sup>7</sup> However, Trump marshaled eight not-qualified candidates; three appellate court and five district court jurists whom smoothly won appointment.<sup>8</sup> President Trump concomitantly implemented nominal endeavors to identify, recruit, examine, survey, and confirm ethnic minorities; lesbian, gay, bisexual, transgender, or queer ("LGBTQ") candidates; and lawyers who have secured invaluable, less conventional experience, notably defending plentiful individuals accused of crime, although rigorously expanding diversity can substantially improve the federal bench.<sup>9</sup>

The Republican Senate majority in the 115th and 116th Congresses practically terminated the venerable "blue slip" procedure—which enabled senators from a number of jurisdictions which confronted appellate court vacant posts to halt or stall many nominees in Obama's eight years that is the most recent applicable precedent—without sufficient explanation for the drastic change.<sup>10</sup> Senate Judiciary Committee panel nominee hearings lacked robustness, because the GOP majority did not await, much less consider, valuable ABA information and encouraged rigorous nominee probing in committee hearings and discussions before votes.<sup>11</sup>

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7. See Carl Tobias, *Selecting District Judges in the 116th Senate Lame Duck Session*, 37 YALE J. ON REG. NOTICE AND COMMENT, Dec. 4, 2020, at nn. 7–8; see also Ann Marimow & Matt Viser, *Biden Moves Quickly to Make His Mark on Federal Courts After Trump's Record Judicial Nominations*, WASH. POST (Feb. 3, 2021), [https://www.washingtonpost.com/local/legal-issues/biden-judge-nominations/2021/02/02/e9932f3a-6189-11eb-9430-e7c77b5b0297\\_story.html](https://www.washingtonpost.com/local/legal-issues/biden-judge-nominations/2021/02/02/e9932f3a-6189-11eb-9430-e7c77b5b0297_story.html) [<https://perma.cc/3CXS-32FA>].

8. ABA STANDING COMM. ON JUDICIARY, *Ratings of Art. III and Art. IV Judicial Nominees: 115th Cong.* (2018); ABA STANDING COMM. ON JUDICIARY, *Ratings of Art. III and Art. IV Judicial Nominees: 116th Cong.* (2020). GOP senators dispute ABA ratings, as it is a liberal political group. *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 117th Cong. (Oct. 30, 2019); see U.S. Courts, *supra* note 2 (table of judicial confirmations noting confirmation of eight judges who received not qualified ratings).

9. Tobias, *supra* note 4, at 210–11; see U.S. Courts, *supra* note 2 (in 231 Trump federal court appointees, merely two confirmed are openly LGBTQ and thirty-two appointed are people of color); Carl Tobias, *President Donald Trump's War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531 (2019); Tierney Sneed, *Inside Democrats' Quest to Nominate Judges Who Break the Ex-Prosecutor Mold*, CNN (July 28, 2021), <https://www.cnn.com/2021/07/28/politics/biden-judicial-nominations-public-defenders-professional-diversity/index.html> [<https://perma.cc/5R6L-ZTD6>].

10. Carl Tobias, *Senator Chuck Grassley and Judicial Confirmations*, 104 IOWA L. REV. ONLINE 31, 54–55 (2019); Tobias, *supra* note 7, at note 25 (Republicans convened fifteen hearings for two circuit nominees absent Democrats' approval, in sharp contrast to Democrats' three similar sessions in eight Obama years with GOP permission).

11. 163 CONG. REC. S8,022–24 (daily ed. Dec. 14, 2017) (statements of Sen. Feinstein & Sen. Leahy); see Tobias, *supra* note 4, at 214–15; Carl Tobias, *Filling the Federal District Court Vacancies*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 421, 441 (2020) (many of the nominees won close panel and chamber votes).

These regimes yielded jurists who essentially decided cases in ways that facilitated Trump efforts or can stymie Biden initiatives.<sup>12</sup>

## II. BIDEN ADMINISTRATION JUDICIAL SELECTION

Across the 2020 presidential campaign and since Biden won, the President has pledged to carefully remedy former President Trump appointments' troubling effects.<sup>13</sup> In late March 2021, the new chief executive announced his intent to select the first contingent of prospects: eleven astute, centrist, diverse nominees.<sup>14</sup> The submissions included the first Muslim trial level nominee and multiple Black women for appellate court openings; two of the latter picks had superbly represented numerous defendants accused of crimes, although President Trump failed to marshal *one single* Black nominee for a circuit vacancy.<sup>15</sup> Especially relevant to this

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12. See Tobias, *supra* note 4, at 219–23; see also PEOPLE FOR AM. WAY, *Confirmed Judges, Confirmed Fears: The Continuing Harm Caused By Confirmed Trump Federal Judges* (2019); Ian Millhiser, *How Republicans Rigged Texas's Federal Courts Against Biden*, VOX (Aug. 10, 2022, 7:00 AM), <https://www.vox.com/policy-and-politics/2022/8/10/23296841/supreme-court-biden-judiciary-republicans-texas-judge-shopping-immigration-obamacare> [<https://perma.cc/2UE8-MYB2>]; Elie Mystal, *The Trump Judges Are Officially Running the Show*, NATION (Sept. 19, 2022), <https://www.thenation.com/article/politics/aileen-cannon-trump-judge/> [<https://perma.cc/75BJ-2H7E>]; see also Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373 (2021). One compelling recent example is Southern District of Florida Judge Aileen Cannon whom Trump confirmed after the former President had lost the presidential election to Biden. The jurist is responsible for the Mar-a-Lago documents litigation which Trump has pursued. *Trump v. United States of America*, Docket No. 9:22-cv-81924 (S.D. Fla. Aug. 22, 2022), Court Docket; see Charlie Savage, *'Deeply Problematic': Experts Question Judge's Intervention in Trump Inquiry*, N.Y. TIMES (Sept. 5, 2022), <https://www.nytimes.com/2022/09/05/us/trump-special-master-aileen-cannon.html> [<https://perma.cc/E54M-C26J>]. See generally *infra* note 53.

13. Tobias, *supra* note 10 (defining regular order as the requirements and customs that the GOP Senate majority pledged to restore after recapturing the majority in the 2014 mid-term elections but greatly undercut); Press Release, White House, Off. Press Sec'y, Statement by President Joe Biden on First Confirmations of His Judicial Nominees (June 8, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/08/statement-by-president-joe-biden-on-the-first-confirmations-of-his-judicial-nominees/> [<https://perma.cc/DGA6-77CE>].

14. See *infra* notes 20–28 and accompanying text; see also Tobias, *supra* note 4, at 222 (analyzing the numerous benefits that diversity affords); Adrian Blanco, *Biden, Who Pledged to Diversify the Supreme Court, Has Already Diversified Lower Courts*, WASH. POST (Jan. 27, 2022, 5:00PM), <https://www.washingtonpost.com/politics/2022/01/27/federal-judge-diversity-biden/> [<https://perma.cc/E2VT-4TSZ>].

15. Trump nominated *no* Black individual in fifty-four circuit judges. *Hearing on Nominees Before the S. Judiciary Comm.*, 117th Cong. (Apr. 28, 2021) (statement of Senator Durbin); Blanco, *supra* note 14; Lynn Sweet, *Jackson-Akiwumi Would Be Rare Judge Who Was a Public Defender Highlighted at Her Senate Confirmation Hearing*, CHI. SUN-TIMES (Apr. 28, 2021, 9:06 PM), <https://chicago.suntimes.com/columnists/2021/4/28/22408732/jack>

piece are the five Biden suggestions whom the chamber processed first; however, the individuals epitomize seventy more 2021 possibilities and a substantial number of the choices whom he proposed in 2022.<sup>16</sup>

On March 30, President Biden announced that the White House would directly submit the candidates, even though the process which resulted in the nominations had started considerably earlier.<sup>17</sup> In 2020, candidate Biden had organized a presidential transition judicial appointments team, which did enable him to robustly scrutinize numerous highly competent, moderate, diverse prospects ahead of the January 20, 2021, inauguration. By summer 2020, the group had rigorously compiled and effectuated constructive appointments procedures while identifying numerous extremely capable ostensible selections. After Biden vanquished Trump in November, the formal transition began. Most pertinently, Dana Remus, the White House Counsel Designate, wrote senators a December letter, imploring politicians from jurisdictions with empty seats to recommend well qualified, centrist persons for nominees who manifest the diversity requisites before January 20, 2021.<sup>18</sup>

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son-akiwumi-senate-confirmation-hearing-would-be-rare-judge-public-defender [https://perma.cc/HQ5M-2GTV]; see also *infra* note 33.

16. President Biden bolstered the first group of remarkable, centrist, diverse nominees, who are the emphasis in this piece, with twenty-six additional slates of similar lower court nominees. Press Release, White House, Off. Press Sec'y, President Biden Announces Intent to Nominate 11 Judicial Candidates (Mar. 30, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/30/president-biden-announces-intent-to-nominate-11-judicial-candidates/> [https://perma.cc/Q5GA-L39U]. The White House transmitted the Second, Third, and Fourth slates on April 29, May 12, and June 15 and the remaining twenty-three rounds on June 30, August 5, September 8, 30, November 3, 17, and December 15, 23, 2021, and January 19, February 2, 22, April 13, 27, May 25, June 15, 29, July 12, 13, 14, 29, August 9, September 2, and October 14, 2022.

17. I depend substantially in this paragraph and throughout this section of the piece on Collins, *supra* note 2; Marimow & Viser, *supra* note 6; Ian Millhiser, *Biden's Fight to De-Trumpify the Courts, Explained*, VOX (July 31, 2021, 8:00 AM), <https://www.vox.com/22587059/joe-biden-courts-judicial-nominations-donald-trump-supreme-court-barack-obama> [https://perma.cc/J882-RBEK]; Zoe Tillman, *Trump Transformed the Federal Courts. Here's What Biden Could Do*, BUZZFEED NEWS (Dec. 17, 2020, 4:26PM), <https://www.buzzfeednews.com/article/zoetillman/trump-judges-appoint-biden-courts> [https://perma.cc/BA2F-CRY6].

18. Remus afforded senators forty-five days to transmit recommendations for new vacancies which subsequently materialized. Letter from Dana Remus, White House Counsel-Designate, to U.S. Senators (Dec. 22, 2020); see Courtney Rozen & Madison Alder, *Biden Deadline for Judicial Nominees Challenges Senate Democrats*, BLOOMBERG (Apr. 23, 2021, 4:46 AM), [https://www.bloomberglaw.com/bloomberglawnews/us-law-week/BN%2000000178be1dda2adfaebef1dbf0001?bna\\_news\\_filter=us-law-week](https://www.bloomberglaw.com/bloomberglawnews/us-law-week/BN%2000000178be1dda2adfaebef1dbf0001?bna_news_filter=us-law-week) [https://perma.cc/3G7G-BFNC]; Peter Baker & Michael D. Shear, *Biden Makes Staff Changes as White House Counsel Departs, Midterms Loom*, N.Y. TIMES (June 15, 2022), <https://www.nytimes.com/2022/06/>



In April, Biden officially nominated the five exceptional candidates whom the Senate appointed in June.<sup>19</sup> They included two especially competent, 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, highly regarded Seventh Circuit advocate Candace Jackson-Akiwumi for that court.<sup>20</sup> President Obama had mustered Jackson's 2013 district court appointment, later considered the aspirant for the High Court opening to which he actually nominated D.C. Circuit Chief Judge Merrick Garland, and Biden named Judge Jackson this year when Justice Stephen Breyer, for whom the pick had clerked, retired.<sup>21</sup> She is a talented, moderate, diverse jurist.<sup>22</sup> Jackson-Akiwumi productively clerked for well-respected trial level and appellate court judges, ably litigated with one large firm during a couple of years, and competently represented numerous individuals accused of crimes over a decade.<sup>23</sup>

Biden also nominated three excellent, mainstream district court judges. One was highly qualified New Jersey lawyer Zahid Qurashi, who is the first Muslim Article III jurist; the nominee received elevation from a United States Magistrate judgeship in the New Jersey District.<sup>24</sup> Regina Rodriguez, who effectively litigated with

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15/us/politics/biden-keisha-lance-bottoms.html [https://perma.cc/KPF7-8MZT] (documenting Remus' departure).

19. See Press Release, White House, Off. Press Sec'y, Nominations Sent to the Senate (Oct. 19, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/19/nominations-sent-to-the-senate-84/> [https://perma.cc/8YWK-HGBY]; see also *infra* note 52.

20. Press Release, *supra* note 16; see Carl Hulse, *Senate Confirms Top Biden Judge as McConnell Threatens Future Nominees*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/us/ketanji-brown-jackson-mcconnell-judges.html> [https://perma.cc/TG4V-SEXJ]; U.S. Courts, *supra* note 2 (table of judicial confirmations documenting eight additional well qualified, mainstream Black picks whom Biden nominated and the Senate confirmed as circuit judges).

21. See U.S. Courts *supra* note 2 (table of judicial confirmations from the 117th Congress and archive of judicial confirmations from 2013). For the legality and the propriety of the GOP Senate majority's refusal to even consider Chief Judge Garland for the Supreme Court in the 2016 presidential election year, see 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); Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1093 (2017).

22. See Press Release, *supra* note 16; see also Adam Liptak, *Justice Jackson, a Former Law Clerk, Returns to a Transformed Supreme Court*, N.Y. TIMES (July 18, 2022), <https://www.nytimes.com/2022/07/18/us/politics/ketanji-brown-jackson-sctus.html> [https://perma.cc/5E82-5W2B].

23. See Press Release, *supra* note 16; see also Sweet, *supra* note 14.

24. See Press Release, *supra* note 16; Azi Paybarah, *Biden Confirms First Muslim Federal Judge*, N.Y. TIMES, (June 12, 2021), <https://www.nytimes.com/2021/06/11/nyregion/za>

a major firm over years following very capable service as a federal prosecutor, captured appointment to the District of Colorado.<sup>25</sup> Julien Neals, who served as a well-regarded municipal court judge in Newark and a Bergen County administrator, marshaled confirmation to the District of New Jersey.<sup>26</sup> President Obama had mustered Neals and Rodriguez during his tenure's later years; nevertheless, the GOP majority rejected considering both of the nominees and dozens more Obama selections who required final votes.<sup>27</sup> The three district court nominees' testimony warrants minimal perusal here, as they confronted tiny numbers of "friendly questions from [Senators Richard] Durbin (D-IL) and [Corey] Booker (D-NJ)."<sup>28</sup>

When accepting the important role of Judiciary Committee Chair, Senator Durbin astutely pledged to cautiously and equitably lead the committee and support robust member participation. However, Durbin warned GOP senators that practices and customs resembling some procedures and conventions which Republicans employed to appoint Trump nominees would control both parties. For instance, Durbin said that Democrats would retain the GOP "appellate court exception" to the blue slip process which then-

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hid-quraishi-first-muslim-federal-district-judge.html [https://perma.cc/M5XJ-KWPJ]; see also 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://slate.com/news-and-politics/2021/04/zahid-quraishi-muslim-federal-judge-criticism.html [https://perma.cc/5LPN-YGG3].

25. See Press Release, *supra* note 16; see also Nicholas Fandos, *Biden's First Two Judicial Nominees are Confirmed with Modest Republican Support*, N.Y. TIMES, https://www.nytimes.com/2021/06/08/us/Senate-confirms-Biden-judges.html [https://perma.cc/3GXB-VBP H] (June 15, 2021); Justin Wingerter, *U.S. Senate Confirms New Colorado Federal Judge after Five Year Wait*, DENVER POST (June 8, 2021, 2:34 PM), https://www.denverpost.com/2021/06/08/regina-rodriguez-judge-colorado-us-senate/ [https://perma.cc/8CYH-P UJD].

26. Press Release, *supra* note 16; see Fandos, *supra* note 25.

27. Press Release, White House, Off. Press Sec'y, Presidential Nominations Sent to the Senate (Feb. 26, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/02/26/presidential-nominations-sent-senate [https://perma.cc/L2US-XM8E] (documenting Neals nomination); Press Release, White House, Off. Press Sec'y, Presidential Nominations Sent to the Senate (Apr. 28, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/04/28/presidential-nominations-sent-senate-0 [https://perma.cc/49DL-UDD4] (documenting Rodriguez nomination); see Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 18–19 (2017).

28. Andrew Kragie, *Biden's Appellate Picks Tackle GOP Queries on Race, Politics*, LAW360 (Apr. 28, 2021), https://www.law360.com/pulse/articles/1379211?scroll=1&related=1 [https://perma.cc/RMB3-G38C]; see *Hearing, supra* note 15; Carl Hulse, *Senate Begins Considering Diverse Slate of Biden Judicial Nominees*, N.Y. TIMES, https://www.nytimes.com/2021/04/28/us/politics/biden-judicial-nominees.html [https://perma.cc/D42R-UT 3X] (June 8, 2021). Republican members asked no questions, as they ostensibly focused on the circuit nominees.

Chair Senator Chuck Grassley (R-IA) had fashioned absent persuasive support.<sup>29</sup>

President Biden quickly sent complete paperwork while formally marshaling eleven nominees for senators to consider in mid-April.<sup>30</sup> The panel speedily circulated extensive questionnaires to nominees, who promptly mustered impressive responses.<sup>31</sup> The committee supplied public notice of the April 28 hearing seven days before the panel mounted the rigorous session and the identities of the nominees were marshaled two days later.<sup>32</sup>

Chair Durbin opened the hearing by asserting that the session was “historic,” because every pick was a nominee of color, representing much salient diversity.<sup>33</sup> Each appellate court nominee afforded clear and thorough responses. A few GOP members stressed both nominees’ criminal defense work perhaps attempting to

29. Durbin remarked that Democrats would terminate GOP “ability to block district court nominees through the arcane ‘blue slip’ process, . . . [if it] were obstructing nominations without legitimate grounds.” Carl Hulse, *Senate Begins Considering Diverse Slate of Biden Judicial Nominees*, N.Y. TIMES (Mar. 1, 2021), <https://www.nytimes.com/2021/03/01/us/politics/durbin-senate-judiciary-garland.html> [https://perma.cc/5WTR-PEPW]; Marianne Levine, *Senate Dems Take a Page from GOP in Judicial Nominee Battles*, POLITICO (Feb. 17, 2021), <https://www.politico.com/news/2021/02/17/court-nominees-democrats-469500> [https://perma.cc/T7RW-ZFMV]; see Mike DeBonis, ‘A Singular Focus’: Durbin is Determined to Make History as he Works to Confirm Biden’s Supreme Court Pick, WASH. POST (Feb. 21, 2022), <https://www.washingtonpost.com/politics/2022/02/21/durbin-biden-supreme-court/> [https://perma.cc/JQ9B-9VW7]; sources cited *supra* note 10.

30. Biden nominated Judge Florence Pan to D.C. District and Circuit vacancies left when Biden elevated Jackson to the D.C. Circuit and the Supreme Court. Press Release, White House, Off. Press Sec’y, Nominations Sent to the Senate (June 15, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/15/nominations-sent-to-the-senate-20/> [https://perma.cc/8JYT-KD7D]; Press Release, White House, Off. Press Sec’y, Nominations Sent to the Senate (May 25, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/25/nominations-sent-to-the-senate-69/> [https://perma.cc/D6WB-K68P]; see sources cited *supra* notes 18, 20–21.

31. See S. JUDICIARY COMM., 117th Cong., Questionnaires and Responses of Candace Jackson-Akiwumi (Apr. 28, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Jackson-Akiwumi%20Responses1.pdf> [https://perma.cc/4ZK5-Z3JV]; S. JUDICIARY COMM., 117th Cong., Questionnaires and Responses of Ketanji Brown Jackson (Apr. 28, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Brown%20Jackson%20Responses1.pdf> [https://perma.cc/DJF4-85WC]; S. JUDICIARY COMM., 117th Cong., Questionnaires and Responses of Julien Neals (Apr. 28, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Neals%20Responses.pdf> [https://perma.cc/2CEF-DCGY]; S. JUDICIARY COMM., 117th Cong., Questionnaires and Responses of Regina Rodriguez (Apr. 28, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Rodriguez%20Responses.pdf> [https://perma.cc/DYX8-PWZ9]; and S. JUDICIARY COMM., 117th Cong., Questionnaires and Responses of Zahid Qurashi (Apr. 28, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Quraishi%20Responses.pdf> [https://perma.cc/L2FP-L5M6].

32. See *Hearing on First Judicial Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (Apr. 28, 2021); see also Tobias, *supra* note 4, at 211–17.

33. *Hearing*, *supra* note 15 (lauding Biden’s comprehensive, effective diversity efforts and criticizing Trump’s lack of endeavor).

undermine them. For instance, Senator Tom Cotton (AR) questioned Jackson's representation of a Guantanamo Bay prison "terrorist," yet she did remark that the judge assigned her to defend the party.<sup>34</sup> Senator John Cornyn (TX) probed race's effect on her determinations, but the jurist replied she was independent and premised every case disposition on its law and facts.<sup>35</sup> When GOP senators pursued her views on making the High Court larger and regarding the Justices' decisions, the nominee respectfully declined to answer most queries.<sup>36</sup>

Candace Jackson-Akiwumi carefully responded to analogous queries.<sup>37</sup> For example, Grassley questioned her defense of a "criminal" who was prosecuted for weapons trafficking,<sup>38</sup> which she addressed by reiterating that her duty was proffering the zealous representation to which defendants have a right in the federal criminal justice system.<sup>39</sup> When GOP legislators pressed her about ethnicity's impact on circuit disputes, she explicitly replied: "I don't believe race will play a role in the type of judge I would be."<sup>40</sup> However, the nominee stated that diversity performs a valuable role, as diversity facets enhance citizen acceptance of court rulings.<sup>41</sup> She also did cogently realize that greater diversity promotes role modeling for students and counsel, who can aspire to public service.<sup>42</sup> When GOP lawmakers distinctly probed her views

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34. Judge Jackson explained that doing criminal defense work improves her resolution of many suits. *Hearing, supra* note 14; Hulse, *supra* note 28; Ann E. Marimow, *Biden Judicial Pick Ketanji Jackson Defends Her Independence in Senate Hearing*, WASH. POST (Apr. 28, 2021, 4:36 PM), [https://www.washingtonpost.com/politics/judge-ketanji-brown-jackson-defends-independence-in-senate-hearing/2021/04/28/ea4015c8-a794-11eb-8d25-7b30e74923ea\\_story.html](https://www.washingtonpost.com/politics/judge-ketanji-brown-jackson-defends-independence-in-senate-hearing/2021/04/28/ea4015c8-a794-11eb-8d25-7b30e74923ea_story.html) [<https://perma.cc/M2M8-7SAW>]; see Carl Hulse, *As Jackson Faces Senators, Her Criminal Defense Record is a Target*, N.Y. TIMES, <https://www.nytimes.com/2022/03/16/us/politics/ketanji-brown-jackson-criminal-defense.html> [<https://perma.cc/Q45G-3QE5>] (June 13, 2022).

35. See *Hearing on Nominees Before the S. Judiciary Comm.*, *supra* note 15.

36. See *id.*; Exec. Order No. 14,023, Establishment of the Presidential Commission on the U.S. Supreme Court, 86 Fed. Reg. 16,569 (Apr. 9, 2021); see PRESIDENTIAL COMM'N ON SUP. CT., *supra* note 2.

37. See *supra* notes 34, 36 and accompanying text.

38. See *Hearing on Nominees Before the S. Judiciary Comm.*, *supra* note 15; see also Hulse, *supra* note 28. Grassley currently serves as the Judiciary Committee Ranking Member.

39. See *Hearing on Nominees Before the S. Judiciary Comm.*, *supra* note 15; see also Sweet, *supra* note 15.

40. See *Hearing on Nominees Before the S. Judiciary Comm.*, *supra* note 15; see also Hulse, *supra* note 28; *supra* note 36 (Jackson's analogous perspectives).

41. It expands confidence in courts. See *Hearing on Nominees Before the S. Judiciary Comm.*, *supra* note 15; see also Hulse, *supra* note 28; Sweet, *supra* note 15.

42. See *Hearing on Nominees Before the S. Judiciary Comm.*, *supra* note 15; see also Hulse, *supra* note 28; Sweet, *supra* note 15.

specifically about the ideal contingent of Justices and their precedents, the nominee respectfully demurred.<sup>43</sup>

The Chair granted members one week to proffer Questions for the Record (“QFRs”) and the nominees seven days to respond.<sup>44</sup> The designees provided swift, expansive replies.<sup>45</sup> In a subsequent Executive Business Meeting, the panel deliberated on issues central to efficacious nominee service and voted.<sup>46</sup> Grassley proclaimed that the GOP must hold “nominees to a high standard of constitutionalism, regardless of how impressive their credentials are [, yet] unless a nominee can show me [allegiance] to the Constitution as originally understood, [the person] should not be confirmed.”<sup>47</sup> The Ranking Member asserted that Jackson failed to eschew a “living Constitution,” although the jurist had specifically rejected this notion in her earlier trial court process,<sup>48</sup> and Durbin sharply criticized Grassley, characterizing his point of view as an improper “litmus test.”<sup>49</sup> Grassley voiced concerns respecting Jackson-

43. See *Hearing on Nominees Before the S. Judiciary Comm.*, *supra* note 15; see also Hulse, *supra* note 28; *supra* note 36 (Jackson’s analogous response).

44. See *Hearing on Nominees Before the S. Judiciary Comm.*, *supra* note 15. QFRs should be rigorous and typically address issues that are not treated in committee hearings or for which members lacked time to probe nominees or for which they pursue nominee elaboration.

45. S. JUDICIARY COMM., 117th Cong., Candace Jackson-Akiwumi Responses to Questions for the Record (May 5, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Jackson-Akiwumi%20Responses1.pdf> [<https://perma.cc/ANR6-UAH9>] (PDF); S. JUDICIARY COMM., 117th Cong., Ketanji Brown Jackson Responses to Questions for the Record (May 5, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Brown%20Jackson%20Responses1.pdf> [<https://perma.cc/E6KF-WT2X>] (PDF); S. JUDICIARY COMM., 117th Cong., Julien Neals Responses to Questions for the Record (May 5, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Neals%20Responses.pdf> [<https://perma.cc/5XP3-J6TN>] (PDF); S. JUDICIARY COMM., 117th Cong., Zahid Quraishi Responses to Questions for the Record (May 5, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Quraishi%20Responses.pdf> [<https://perma.cc/RWC6-7JT7>] (PDF); S. JUDICIARY COMM., 117th Cong., Regina Rodriguez Responses to Questions for the Record (May 5, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Rodriguez%20Responses.pdf> [<https://perma.cc/5MUL-M9DB>] (PDF).

46. See *Executive Business Meeting*, S. COMM. ON THE JUDICIARY (May 20, 2021), <https://www.judiciary.senate.gov/meetings/05/13/2021/executive-business-meeting> [<https://perma.cc/LRL5-8BB5>]; see also Carl Hulse, *Senate Panel Advances First Biden Judicial Picks over G.O.P. Opposition*, N.Y. TIMES, <https://www.nytimes.com/2021/05/20/us/senate-judges-biden.html> [<https://perma.cc/Z84M-RZX5>] (June 8, 2021).

47. See *Executive Business Meeting*, *supra* note 46 (stating that Judge Jackson did not subscribe to originalism); see also Hulse, *supra* note 46.

48. See *Executive Business Meeting*, *supra* note 46; see also *Hearings before the S. Comm. On the Judiciary United States S.*, 112th Cong. 758-59 (2012) (response of Ketanji B. Jackson, nominee to be United States District Judge for District of Columbia to Senator Tom Coburn, MD).

49. For committee originalism debates, see *S. Judiciary Committee Holds Hearing on Pending Nominations*, 117th Cong. (June 9, 2021); *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 117th Cong. (Sept. 7, 2022); *Executive Business Meeting*, S. COMM. ON THE JUDICIARY (June 10, 2021); Brad Kutner, *Originalism Debate*

Akiwumi’s “commitment to applying Seventh Circuit and Supreme Court precedents on the Second Amendment [, her current perspective] on *Roe v. Wade* [, and certain] other aspects of her federal defender cases,” even though the nominee repeatedly informed legislators that she would dutifully follow all relevant precedents.<sup>50</sup>

Because the candidates whom Biden tendered are exceptional suggestions, who did cogently and comprehensively respond to a plethora of complex inquiries, they decidedly merited extremely strong panel approval. Nonetheless, merely *two* Republicans cast votes for Jackson and *a single* GOP politician chose to directly support Jackson-Akiwumi, but considerably greater numbers of Republican members helped appoint district court prospects Neals, Quraishi, and Rodriguez.<sup>51</sup> Therefore, Durbin rapidly moved all five of the nominees onto the floor.

Majority Leader Chuck Schumer (NY) attempted to promptly set numerous confirmation debates and ballots for the remarkably qualified, moderate, diverse nominees, yet the GOP rejected unanimous consent to authorize voice votes regarding any of the five stellar picks. Thus, Schumer proposed cloture which halted debate after a chamber majority agreed; the Majority Leader then speedily conducted robust debates and the possibilities felicitously won confirmation.<sup>52</sup>

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*Swamps Senate Judiciary Hearing*, LAW.COM (Sept. 7, 2022), <https://www.law.com/nationaljournal/2022/09/07/debate-over-originalism-swamps-senate-judiciary-hearing/?slretu rn=20220926135339> [<https://perma.cc/RZB6-L22W>].

50. *Hearing on Nominees Before the S. Judiciary Comm.*, *supra* note 15. Grassley remarked that the “district nominees seemed well qualified,” voting for all. *See* sources cited *supra* note 46; Andrew Kragie, *Sens. Advance Judge Jackson, 4 More Biden Judicial Picks*, LAW360 (May 20, 2021, 2:50 PM), <https://www.law360.com/pulse/articles/1386324/sens-advance-judge-jackson-4-more-biden-judicial-picks> [<https://perma.cc/M3HE-GMXV>].

51. The initial five Biden nominees’ panel votes were 13-9 (Jackson), 12-10 (Jackson-Akiwumi), 15-6 (Neals), 19-3 (Quraishi), and 17-5 (Rodriguez). *Executive Business Meeting*, *supra* note 46; *see also* sources cited *supra* note 50; sources cited *infra* note 52.

52. For the cloture ballots, *see* 167 CONG. REC. S3,943–44, S3,953 (daily ed. June 7, 2021) (Neals); 167 CONG. REC. S3,967–72 (daily ed. June 8, 2021) (Rodriguez); 167 CONG. REC. S4,024–26 (daily ed. June 10, 2021) (Quraishi); 167 CONG. REC. S4,023 (daily ed. June 10, 2021) (Jackson); 167 CONG. REC. S4,710–11, S4,723 (daily ed. June 23, 2021) (Jackson-Akiwumi). For chamber floor debates and votes, *see* 167 CONG. REC. S3,969–71 (daily ed. June 8, 2021) (Neals); 167 CONG. REC. S3,975 (daily ed. June 8, 2021) (Rodriguez); 167 CONG. REC. S4,027–29, S4,032 (daily ed. June 10, 2021) (Quraishi); 167 CONG. REC. S4,504–07, S4,511 (daily ed. June 14, 2021) (Jackson); 167 CONG. REC. S4,735, S4,748 (daily ed. June 24, 2021) (Jackson-Akiwumi); *see also* Fandos, *supra* note 25.

## III. IMPLICATIONS OF BIDEN AND TRUMP JUDICIAL SELECTION

Biden and the narrow Senate majority respected their constitutional duties by approving the first two rigorous, centrist, diverse appeals court jurists and eleven similar other appellate court judges his initial year.<sup>53</sup> Biden nominates by consulting receptive politicians from home states who analyze capable, mainstream, diverse prospects and send them for review by the President who carefully nominates, and the chamber thoroughly, swiftly, and fairly canvasses, probes, and confirms them. For example, he appoints appellate court judges, who improve ethnic, gender, sexual orientation, ideological, and experiential diversity, by prioritizing circuit vacancies and cultivating senators.<sup>54</sup>

Former President Trump and the GOP chamber majorities in the 115th and 116th Congress broke records for approving conservative appellate court jurists, who now comprise thirty percent of active federal judges; they can serve for years and issue troubling opinions, which have (1) permitted Trump endeavors that the former President clearly based on weak legal support or (2) undercut President Biden's initiatives to positively move the nation.<sup>55</sup> Trump and the GOP chamber majorities downplayed "blue" state trial level judges, plus emergency openings which remained numerous, and diverse confirmees, the number of whom sharply plummeted.

The appellate courts have nine current vacancies, while seven active jurists would promptly assume senior status pending

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53. See U.S. CONST. art. II, § 2; see Press Release, *supra* note 16 (first cohort's additional judges); U.S. Courts, *supra* note 2 (archive of judicial confirmations noting eleven more circuit judges and sixty-eight similar lower court nominees his first year; a Justice, thirty-nine lower court judges, and fifty-six nominees so far the second year).

54. Appellate courts that former President Trump packed with conservatives cover multiple states and make considerably more policy. See *supra* notes 4–10; Carl Tobias, *How Biden Began Building Back Better the Federal Bench*, 78 WASH. & LEE L. REV. ONLINE 31, 47–48 (2021); Madison Alder, *Senate Resumes Judges Push, Confirms Seventh Circuit Nominee*, BLOOMBERG (Sept. 7, 2022, 4:16 PM), <https://news.bloomberglaw.com/us-law-week/senate-resumes-push-on-judges-confirms-seventh-circuit-nominee> [<https://perma.cc/H5WY-Z74S>]; Carl Hulse, *Despite Biden's Success on Judges, Progressives Demand Faster Pace*, N.Y. TIMES (July 29, 2022), <https://www.nytimes.com/2022/07/29/us/politics/biden-judges-democrats-senate.html> [<https://perma.cc/AZT6-M6EA>].

55. See sources cited *supra* note 12; see also Carl Hulse, *Mitch McConnell's Court Delivers*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/27/us/politics/mitch-mcconnell-supreme-court.html> [<https://perma.cc/M6ZA-7N47>]; Ian Millhiser, *The Supreme Court's New Term Could Be Even More Consequential Than Its Last One*, VOX (Sept. 26, 2022, 5:00 AM), <https://www.vox.com/policy-and-politics/2022/9/26/23343192/supreme-court-voting-rights-abortion-affirmative-action-race-medicare-clean-water> [<https://perma.cc/G9Y6-ANK9>].

replacements' confirmation, and merely four openings lack nominees.<sup>56</sup> Democrats hold a slim chamber majority which they could have forfeited in this November's midterm elections. Therefore, the final portion of this article offers numerous remedies that Biden and the Senate can apply to confirm accomplished, centrist, diverse judges who receive prompt appointment over Congress' lame duck session which commences subsequent to those elections.

#### IV. SUGGESTIONS REGARDING THE LAME DUCK SESSION

##### A. *The Confirmation Process and the Senate Calendar*

Particular temporal restraints appear essential. For instance, election day was late, which means that the chamber will assemble the following week; Thanksgiving Recess begins a few days thereafter; plus holiday recesses will exclude December's last week. Those scheduling realities provide only twenty workdays for the session, if the politicians convene Mondays and exit Thursdays, while requiring creativity and strategic prioritization. Should the chamber duly adhere to traditions, the Senate would lack time for nominations; robust committee examinations, hearings, discussions, plus votes; and rigorous Senate confirmation debates and prompt ballots. Thus, the majority would need to prioritize multiple phenomena, such as circuit, rather than district, vacant positions; state representation by Democratic over GOP politicians; and confirmations versus nominations.

Biden must actively keep nominating—and the President may want to continue naming—aspirants simultaneously with candidate announcements,<sup>57</sup> while promoting careful, quick reviews. The majority should dutifully institute numerous pragmatic goals and the committee and the chamber might at once streamline, compress, and expedite the confirmation process, recognizing that

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56. U.S. Courts, *supra* note 2 (tables of current and future judicial vacancies noting seventy-six district court openings). Replacing Justice Breyer with Judge Jackson consumed resources that may have been deployed to appoint lower court judges.

57. President Biden recently did this. *See supra* note 16 and accompanying text (twenty-first and twenty-second rounds of nominations on July 12 and 13); Press Release, White House, Off. of Press Sec'y, Nominations Sent to the Senate (July 12, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/12/nominations-sent-to-the-senate-73/> [<https://perma.cc/74LM-2ZYD>]; Press Release, White House, Off. of Press Sec'y, Nominations Sent to the Senate (July 13, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/13/nominations-sent-to-the-senate-74/> [<https://perma.cc/HVA8-CG8V>]; *see infra* note 73 and accompanying text.



some limitations will potentially diminish the approvals which can result in a narrow time frame.

The appointments system's pressure points, therefore, merit comprehensive examination to detect whether time savings could realistically be attained plus, if so, exactly how. The confirmation process' first steps include both parties' staff perusal of the nominees mustered and the distribution of questionnaires to nominees who craft responses. Staff, Durbin, and GOP Ranking Member Grassley can, and should, collaborate during the whole process to speed review.<sup>58</sup>

The hearing phase affords possibilities to deliver concise, robust, and equitable nominee scrutiny. Critical and illuminating considerations may be the frequency of hearings and the number of nominees per each hearing. The Chair has normally conducted two sessions all months that legislators convene at which a pair of circuit, and three district, nominees testify. He mounted nine hearings where two circuit selections appeared.<sup>59</sup> This record might favorably compare against ten for pairs of Trump nominees, which then-Chair Grassley marshaled,<sup>60</sup> and five regarding two Trump nominees, which then-Chair Lindsey Graham (R-SC) scheduled.<sup>61</sup> Durbin has essentially resisted importuning of progressive organizations and people, suggesting that the chamber would approve more jurists by conducting hearings every week that politicians work and by increasing the quantity of nominees who testify.<sup>62</sup> Durbin retains his perspective on session frequency, but a few elements

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58. Madison Alder, *Senate Judiciary Panel Will Meet During Recess, Durbin Says*, BLOOMBERG (Sept. 30, 2022, 10:10 PM), [https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XBVLB0EG000000?bna\\_news\\_filter=us-law-week#jcite](https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XBVLB0EG000000?bna_news_filter=us-law-week#jcite) [https://perma.cc/6UYG-ZVDJ].

59. Carl Tobias, *How Biden Could Keep Filling the Circuit Court Vacancies*, 80 WASH. & LEE L. REV. ONLINE 1, 42, 44 n.77 (2022); see Tobias, *supra* note 4, at 213 (documenting three similar committee hearings in eight Obama years).

60. Chair Grassley acted in the 115th Congress; Chair Graham acted in the 116th. Tobias, *supra* note 4, at 213.

61. Chairs Grassley and Graham usually allowed four or five district court nominees. See sources cited *supra* note 54.

62. See Madison Alder, *Durbin Eyes More Nominees As Hearing Time Runs Low*, BLOOMBERG (July 20, 2022, 7:05 PM), [https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XA8IF5GC000000?bna\\_news\\_filter=us-law-week#jcite](https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XA8IF5GC000000?bna_news_filter=us-law-week#jcite) [https://perma.cc/9DXD-RBKP]; see also Christopher Kang, *Democrats Are Headed for a Disaster With Judicial Vacancies*, SLATE (July 5, 2022, 5:50 AM), <https://slate.com/news-and-politics/2022/07/why-democrats-giving-mitch-mcconnell-judges.html> [https://perma.cc/29T3-JVX7]; sources cited *supra* note 54.

prompted Durbin to consider more hearings over recesses and the number of witnesses in each.<sup>63</sup>

Executive Business Meetings comprise the next panel phase in which senators discuss nominee qualifications and vote. Because most of President Biden's nominees lack great controversy and a small number of committee members rigorously deliberate, the meetings consume negligible time.<sup>64</sup> The stricture that enables the minority party to hold over without reason discussions and ballots for one week could warrant reappraisal, as the notion can seem wasteful.<sup>65</sup> After the panel moves nominees to the floor, the Senate Calendar<sup>66</sup> accords the caucus leader and the majority enormous discretion.<sup>67</sup> They could inspect floor rules and conventions and contemplate alteration. One candidate for alteration would be thirty hours for post-cloture debate on appellate court nominees, which senators rarely deploy.<sup>68</sup> The majority can amend this provision, because the GOP lowered a similar requirement to a pair of hours for district nominees.<sup>69</sup> The majority could also survey reviving customs that deftly appoint packages of nominees waiting for

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63. Hearings on Nominations Before the S. Judiciary Comm., 117th Cong. (Sept. 21, 2022) (including four district court nominees, rather than three); Hearings on Nominations Before the S. Judiciary Comm., 117th Cong. (Oct. 12, 2022) (hearing including a single appellate court nominee and four district court nominees when the Senate was in recess to campaign); see Alder, *supra* note 58; see also Elie Mystal, *Democrats Still Aren't Trying Hard Enough to Reclaim the Judiciary*, NATION (Oct. 17, 2022), <https://www.thenation.com/article/politics/how-democrats-reclaim-judicial-branch/> [<https://perma.cc/MG98-F8TG>]. The committee may want to review possible efficiencies, namely time for queries and who can ask them, but the ideas lack merit. Each member has five minutes that many find deficient, and nominal time would be saved. The next stage is seven days for QFRs and nominee responses, but most senators send few queries that consume little time.

64. S. Doc. No. 117-6, 189 (2021–2022) (Senate Judiciary Committee Rule of Procedure I).

65. See *id.* at 189 ¶ 3. Senators might want to consider altering the rule with a good cause requirement. See *id.* at 189 (Rule II).

66. U.S. Senate, Tentative 2022 Legislative Schedule (2022), [https://www.senate.gov/legislative/2022\\_schedule.htm](https://www.senate.gov/legislative/2022_schedule.htm) [<https://perma.cc/K5KR-X3Q5>]. “Tentative” appears to be the operative word.

67. They can open, recess, and close the session. The Majority Leader also controls the floor, but they need to retain a majority by passing laws and seating judges. The time for both may confine approvals. See Michael Shear, *Biden Savors Much-Needed Victories. But Will the Highs Overshadow the Lows?*, N.Y. TIMES (July 30, 2022), <https://www.nytimes.com/2022/07/30/us/politics/biden-inflation-economy-approval.html> [<https://perma.cc/4PP3-LNLF>]; see also sources cited *supra* notes 54, 62–63.

68. See U.S. Senate Comm. on Rules & Admin., Rules of the Senate, Rule XXII (2022); see also Tobias, *supra* note 4, at 216.

69. See 165 Cong. Rec. S2,216–20 (daily ed. Apr. 3, 2019); see also Tobias, *supra* note 4, at 215–17, 217 n.70; Carl Hulse, *G.O.P. Ready to ‘Nuke’ Senate Democrats Again Over Nominee Delays*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/us/politics/senate-nuclear-option-trump.html> [<https://perma.cc/2PT4-58GK>].

confirmation at recesses.<sup>70</sup> Were Republican members to oppose these notions, Democrats can explore the “vote-a-rama” mechanism for those nominees who are on the floor during the 2022 holiday season, which resembles the procedure that Democrats employed in the last holiday session<sup>71</sup> and the GOP used to confirm myriad Trump nominees.<sup>72</sup>

### B. *Other Specific Recommendations*

Biden and the chamber majority have engaged in, and should continue, rigorous advance planning regarding the lame duck session. For example, the plentiful robust, centrist, diverse nominees whom the administration sent over July intimate that Biden may name a few more.<sup>73</sup> Nevertheless, he might think about proffering other superb candidates, because they would enlarge flexibility this year, if necessary, while permitting Biden and lawmakers to expeditiously start the confirmation process in 2023. He and senators must enunciate rigorous goals, particularly by creating salutary priorities.<sup>74</sup>

President Biden adopts solutions that promptly confirm numerous strong, mainstream, diverse jurists. For instance, he elevates a number of picks in lower federal and state courts<sup>75</sup> and masterfully renames exceptional Obama district nominees whom the GOP majority refused to process.<sup>76</sup> Biden should keep applying the constructs, as the first cohort decidedly won prior approval, secured

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70. Both political parties may even agree to voice votes on strong, centrist nominees. See Tobias, *supra* note 4, at 216–17, 216 n.68.

71. See, e.g., 167 Cong. Rec. S9,274–78, 9,284–99 (daily ed. Dec. 17, 2021); 168 Cong. Rec. S4,055–4,163 (daily ed. Aug. 6, 2022) (deploying the vote-a-rama concept for Inflation Reduction Act amendments near the August 2022 Recess).

72. This was the prevailing custom for decades before Obama’s presidency. See Tobias, *supra* note 4, at 216–17, 216 n.67, 217 n.73.

73. E.g., sources cited *supra* note 15; see also *supra* note 56 and accompanying text.

74. For several examples of prioritization which addresses time restraints, see *supra* note 54 and accompanying text.

75. These possibilities include federal district and United States Magistrate Judges and state Supreme Court, intermediate appellate court, and trial court, judges. E.g., *supra* notes 15, 24, 28, 45, 50–52 (Quraishi) and accompanying text. See generally Elisha Carol Savchak, Thomas G. Hansford, Donald R. Songer, Kenneth L. Manning & Robert A. Carp, *The Elevation of District Court Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478 (2006).

76. For renominated nominees, see *supra* notes 26, 45, 50–52 and accompanying text (Neals); *supra* notes 25, 45, 50–52 and accompanying text (Rodriguez). Ninth Circuit Judge Lucy Koh typifies both categories, while her fine colleagues Gabriel Sanchez and Holly Thomas, Second Circuit Judges Alison Nathan and Beth Robinson, and Justice Jackson illuminate elevation. See *supra* notes 15, 20–22, 34–36, 50–52 and accompanying text (Jackson); U.S. Courts, *supra* note 2; *infra* notes 78–81 and accompanying text.

copious expertise, and compiled publicly available records; those in the second nominee group progress smoothly by offering dynamic ABA evaluations, FBI background checks, and comprehensive panel analyses, which merely need updating.<sup>77</sup> Therefore, President Biden may similarly consider renaming Obama and Trump nominees whom the chamber failed to appoint by contacting plentiful in-state legislators and developing finely-calibrated assessments which gauge candidate ability, the quantity and length of judicial vacancies, and crucial election timing.<sup>78</sup>

A renowned idea that Biden employs which derives from his previous Senate and vice presidential experience is consulting home state politicians. The White House seeks, and the President must continue soliciting, perspectives that senators express and cautiously invite the politicians' recommendations about nominees. Contemporary Presidents accord senators less deference respecting appellate court empty posts, as those tribunals include multiple states and enunciate greater policy. However, Biden cultivates numerous lawmakers who must treat vacancies. For instance, he appears to consult all of the California, New York, and Washington senators.<sup>79</sup> Yet, Biden plainly confronts more resistance from states like Tennessee with pairs of GOP senators, who have alleged that he nominally contacted them before tapping the excellent, moderate appellate pick.<sup>80</sup>

Biden correspondingly designated, and keeps setting and respecting, numbers of important priorities. Most critical are confirming and nominating capable, mainstream, diverse aspirants

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77. Tobias, *supra* note 9, at 451–52; Tobias, *supra* note 54, at 47–48. The Senate has now confirmed Jackson to the U.S. Sentencing Commission, the D.C. District and Circuit Courts and the U.S. Supreme Court. Former President Trump confirmed fifteen accomplished, centrist Obama 2016 nominees. *Id.*; see Tobias, *supra* note 27, at 18–19.

78. This idea is more relevant to district court posts for which Biden has seated a few talented centrists like New York Judges Hector Gonzalez and Jennifer Rearden whom Trump named but did not confirm when he left one 2021 circuit, and fifty-two district, court openings. U.S. Courts, *supra* note 2. Circuit jurists set more policy that covers multiple states, and many Trump confirmees and choices lack diversity. See sources cited *supra* notes 3–10 and accompanying text. *But see* U.S. Courts *supra* note 2 (Biden elevation of Trump able, centrist, diverse District Judge Stephanie Dawkins Davis).

79. For Biden's nomination of all New York and Washington senators' appellate court and district court picks and approval of most, but for naming and confirming fewer circuit and district proposals of California Senators Dianne Feinstein and Alex Padilla, see U.S. Courts, *supra* note 2 (tables of current judicial vacancies and judicial confirmations).

80. *Id.* (documenting a Kansas Tenth Circuit vacancy that opened March 15, 2021, which currently has an Aug. 9, 2022, nominee; confirming Sixth Circuit Judge Andre Mathis); Hearing on Nominees Before the S. Comm. on the Judiciary 117th Cong. (Jan. 12, 2022) (documenting Tennessee GOP senators' claims).

for numerous appellate court openings and manifold remaining federal court emergencies.<sup>81</sup> Biden prioritizes courts of appeals with several or protracted vacancies, although a few of the courts lack nominees.<sup>82</sup>

In the lame duck session, each political party must cooperate to improve bipartisan selection by reexamining and dutifully rectifying negative conduct. For example, many GOP politicians vote in lock step, but others eschew this for district nominees. Illustrative are efforts of Senator Graham, who favors most Biden court of appeals nominees for confirmation and in committee, and manifold Republican legislators, who effectively cast panel and chamber ballots for his initial three trial level nominees.<sup>83</sup> The senators also foster considerable delay by requiring cloture on nearly every Biden prospect.<sup>84</sup> The GOP members should analyze whether demanding nominees concur with originalism has morphed into a litmus test, and whether they now might find that certain nominees who represent people accused of crime are unable to fairly decide suits.<sup>85</sup>

Finally, each party may want to closely review and institute strictures that promote the collaborative appointment of exceptional, centrist, diverse federal court jurists and halt or restrict the seemingly incessant “confirmation wars” and deterioration of the selection process characterized by stark politicization. A specific example on which the parties seem to agree is lower courts’ major need for greater resources<sup>86</sup> that distinctly help them promptly,

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81. Instructive examples are remarkable LGBTQ Second Circuit Judges Nathan and Robinson and stellar Justice Jackson; they were strong, diverse centrists for nearly a decade. U.S. Courts, *supra* note 2.

82. Most appellate courts did, or will, confront this issue, so President Biden should treat the question. *See supra* note 56 and accompanying text.

83. *See* Burgess Everett, *Why Lindsey Graham Is Going All-In on Biden SCOTUS Pick*, POLITICO (Feb. 2, 2022, 10:04 AM), <https://www.politico.com/news/2022/02/02/lindsey-graham-biden-scotus-00004388> [<https://perma.cc/XFW9-8LMH>]; *see also supra* notes 43, 48–50; Tobias, *supra* note 54, at 39–40, 48 (noting considerably fewer GOP votes favoring other district court judges).

84. *See supra* note 51. Democrats similarly required cloture on Trump federal court nominees. Tobias, *supra* note 4, at 215.

85. *See supra* notes 19–20, 34, 38–39, 47–50 and accompanying text.

86. *See The Need for New Lower Court Judgeships, 30 Years in the Making: Hearing Before the H. Subcomm. on Courts, Intellectual Property, & the Internet and the H. Comm. on the Judiciary*, 117th Cong. 71–72 (2021) (statement of Marin K. Levy, Professor of Law, Duke Univ. School of Law); *see also* Thomas Berry, U.S. Needs More Federal Judges, WALL ST. J. (Mar. 9, 2021, 12:39 PM), <https://www.wsj.com/articles/the-u-s-needs-more-federal-judges-11615311539> [<https://perma.cc/S64K-TAEL>].

economically, and fairly resolve huge caseloads.<sup>87</sup> One appropriate solution for these matters would be the passage of a comprehensive judgeships bill with over seventy trial level, and two appellate court, slots.<sup>88</sup> This action would implement United States Judicial Conference proposals for the House and Senate that the federal court policymaking arm saliently derives from conservative work and case load estimates which inject bench resources necessary to provide justice.<sup>89</sup> Authorizing seventy-seven district court positions will realize benefits. This might end, or slow, the nomination and confirmation processes' downward spiral and offer (1) the parties realistic incentives to cooperate, (2) jurists who supply most diversity features, and (3) courts necessary judicial resources.<sup>90</sup>

### CONCLUSION

President Biden made substantial progress toward effectuating his solemn pledge to eliminate or at least ameliorate the detriments which former President Trump's lower court nominees imposed by efficaciously appointing very capable, moderate

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87. See Fed. R. Civ. P. 1; see also 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).

88. Congress passed the last countrywide statute in 1990, as the party lacking the White House opposes seats that the opposition can fill. Federal Judgeships Act, Pub. L. No. 101-650, 104 Stat. 5098 (1990); *The Need for New Lower Court Judgeships, 30 Years in the Making: Hearing Before the H. Subcomm. on Courts, Intellectual Property, & the Internet and the H. Comm. on the Judiciary*, supra note 86.

89. U.S. JUDICIAL CONF., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 23–24 (Mar. 16, 2021); see also S. 2535, 117th Cong. (2021) (comprehensive legislation premised on Judicial Conference recommendations for Congress). Other proposed statutes would create 200 district court, yet no appellate court, judgeships, but the GOP may oppose the measure, because Biden would fill many positions. H.R. 4885, 117th Cong. (2021); H.R. 4886, 117th Cong. (2021); see also H.R. 8936 117th Cong. (2022) (bill that would authorize fifty-one appellate court posts); Janelle Bouie, *The Wrong Trump Judge at the Right Time Can Wreak Havoc*, N.Y. TIMES (Sept. 23, 2022), <https://www.nytimes.com/2022/09/23/opinion/cannon-trump-federal-judges.html> [<https://perma.cc/MW5Z-3GKJ>].

90. See supra notes 86–89. The two appellate court judgeships proposed would be woefully inadequate, because appeals courts treat substantial appeals with deficient resources. Merritt McAlister, Rebuilding the Federal Circuit Courts, 116 NW. U. L. REV. 1137, 1195 (2022); Tobias, supra note 59, at 47–48. Related is the concept of a “bipartisan judiciary” that would enable the party which lacks the White House to suggest a comparatively small percentage of nominees. For operational details, see Michael Gerhardt, Judicial Selection as War, 36 U.C. DAVIS L. REV. 667, 688 (2003); Carl Tobias, Fixing the Federal Judicial Selection Process, 65 EMORY L. J. ONLINE 2051, 2057–58 (2016). Yet, this notion merits little review in this article, because Congress is significantly less likely to adopt this construct after the elections than before them when neither Republicans nor Democrats will be certain which party might win and capitalize on the victory to game the selection process. For example, the GOP could remain the minority party and Republicans may eschew new judgeships that a Democratic President and Senate majority could fill. If the GOP opposes the idea, institution might commence during 2025, which may persuade the party to pass a bill.

aspirants. The remarkable twenty-five appellate court and fifty-nine district court judges, and the prominent twelve analogous circuit and forty-five trial court nominees proffered thus far over Biden's second year illuminate this vow. However, the looming elections could have threatened, but did not jeopardize, his appointments record.<sup>91</sup> Thus, Democrats should plan for a robust lame duck session that will confirm a number of able, mainstream jurists secure in the knowledge that President Biden and the chamber majority will have the flexibility to maintain, and perhaps even surpass, the record-shattering judicial appointments pace which they have carefully achieved in the 117th Congress.

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91. When this article was in process, Democrats continued a Senate majority with Nevada Senator Catherine Cortez Masto's retention of her seat. Jonathan Weisman, *Democrats Hold the Senate, as Cortez Masto Ekes Out a Victory in Nevada*, N.Y. TIMES (Nov. 12, 2022), <https://www.nytimes.com/2022/11/12/us/elections/senate-control.html> [<https://perma.cc/7JDT-UWLH>]. Nevertheless, the final composition of the Senate in the 118th Congress will only be determined with the December 6 Georgia runoff election between Senator Raphael Warnock (D) and Republican challenger Herschel Walker, because neither candidate captured a majority in the November 8 election. If Walker defeats Warnock, each party would have the identical number of Judiciary Committee members as it currently possesses, which means that party-line voting would result in tie ballots, thereby necessitating that Democrats capture majority floor votes to discharge nominees from the panel. See S. Res. 27, 117th Cong. (2021) (enacted).