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COMMENTARIES

APPOINT CANDACE JACKSON-AKIWUMI TO THE SEVENTH CIRCUIT

Carl Tobias *

On November 30, 2020, Seventh Circuit Judge Joel Flaum assumed senior status when he completed over four decades of rigorous public service as a prominent jurist.¹ On that day, the Senate resumed the prolonged lame duck session, which the GOP upper chamber majority began after voters had elected Joe Biden to replace former President Donald Trump.² Trump correctly refrained from nominating Flaum's successor. Four months later, President Biden dutifully announced that he would name Candace Jackson-Akiwumi to replace Flaum.³ Jackson-Akiwumi is a particularly qualified, mainstream nominee. Because she comprehensively answered senators' complex, probing questions, and the Seventh Circuit lacks any people of color, the Senate must promptly confirm her.

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1. ADMIN. OFF. OF THE U.S. COURTS, CURRENT JUDICIAL VACANCIES (2020) [hereinafter JUDICIAL VACANCIES], <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> [<https://perma.cc/4J8Q-Z6CK>]; *Joel Martin Flaum*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/flaum-joel-martin> [<https://perma.cc/767J-VY8N>] (discussing Flaum's professional career, education, and federal judicial service).

2. S. CALENDAR OF BUSINESS, 116th Cong., 2d Sess. (2020–2021).

3. *President Biden Announces Intent to Nominate 11 Judicial Candidates*, WHITE HOUSE (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/2JTV-KYQ8>]; Carl Hulse & Michael D. Shear, *Biden Names Diverse Nominees for the Federal Bench*, N.Y. TIMES (Mar. 30, 2021), <https://www.nytimes.com/2021/03/30/us/politics/biden-judges.html> [<https://perma.cc/437E-HQWV>].

The 2020 elections followed nearly four years in which Trump and the chamber majority had appointed three exceedingly conservative, talented, young Justices and fifty-four similar circuit jurists,⁴ primarily by violating the strictures and traditions which have long yielded impressive, moderate judges. For example, Trump rarely consulted senators from jurisdictions with openings, although they know more persons who could be fine jurists.⁵ He also constricted American Bar Association involvement with selection, even though Presidents after the 1950s, save George W. Bush, consistently drew on its meticulous evaluations and practical ratings.⁶

The Senate did not closely analyze people suggested or robustly query designees in Judiciary Committee hearings.⁷ Mitch McConnell (R-KY), the GOP Leader, asserted that his 2020 refrain was “leave no vacancy behind.”⁸ These concerns portended that Trump might nominate, and senators promptly confirm, Flaum’s successor ahead of the Biden inauguration. Trump filling the preeminent jurist’s empty court seat would have been improper, principally because eighty-one million voters chose Biden to submit and confirm judicial prospects,⁹ and inadequate time remained to nominate and confirm a jurist.

On March 30, Biden announced that he would name the first picks—eleven highly capable, mainstream nominees, including Jackson-Akiwumi, who can bring diverse ethnicity, gender, ideology, and experience.¹⁰ Biden chose Jackson-Akiwumi then,

4. JUDICIAL VACANCIES, *supra* note 1 (Confirmations (2017–2020)).

5. See Carl Tobias, *Keep the Federal Courts Great*, 100 B.U. L. REV. ONLINE 196, 206–07 (2020).

6. See Carl Tobias, *Selecting District Judges in the 116th Senate Lame Duck Session*, YALE J. ON REG. NOTICE & COMMENT, Dec. 4, 2020; *infra* notes 7–8 and accompanying text.

7. Tobias, *supra* note 5, at 214–15. The panel also created a “circuit exception” to “blue slips”—that permitted *both* senators from states with circuit vacancies to halt nominees—although each party respected slips all eight years of Barack Obama’s presidency, the most salient precedent. Carl Tobias, *Senator Chuck Grassley and Judicial Confirmations*, 104 IOWA L. REV. ONLINE 31, 54–55 (2019).

8. Chris Cioffi, *McConnell: ‘We’re Going to Clean the Plate’ on Judges*, ROLL CALL (Oct. 30, 2020, 12:47 PM), <https://www.rollcall.com/2020/10/30/mcconnell-senate-judges-lame-duck> [<https://perma.cc/7DUS-K4B5>]; Alex Swoyer, *Mitch McConnell on Judges: My Motto for the Year Is ‘Leave No Vacancy Behind’*, WASH. TIMES (Feb. 11, 2020), <https://www.washingtontimes.com/news/2020/feb/11/mitch-mcconnell-judges-my-motto-year-leave-no-vaca/> [<https://perma.cc/3QMH-X4DB>].

9. See U.S. CONST., art. II, § 2.

10. See sources cited *supra* note 3.

although the process of selection began previously.¹¹ For instance, Richard Durbin (D-IL), the Senate Judiciary Chair, recruited Jackson-Akiwumi in December, while the chief executive interviewed her in January.¹²

Jackson-Akiwumi comprises an extremely qualified, centrist prospect.¹³ She was a 2000 Princeton, and 2005 Yale Law, graduate, who clerked for retired Northern District of Illinois Judge David Coar and Fourth Circuit Judge Roger Gregory. She next litigated with Skadden, Arps in Chicago for three years. Jackson-Akiwumi then served with the Northern District of Illinois Federal Public Defender for over a decade, during which time she represented “400 clients accused of federal crimes at every stage of the process, from investigation to trial and pre-trial proceedings, sentencing, and appeal,” professionally conducted seven federal trials, and briefed plus argued five Seventh Circuit appeals.¹⁴ If confirmed, which experts predict, she will be merely the second Black woman on the Seventh Circuit, its lone person of color now, and the third circuit jurist around the U.S. who has dedicated most of her career to representing people accused with crimes.¹⁵

Soon after Dick Durbin became Chair of the Senate Judiciary Committee, he pledged to equitably lead and support broad, rigorous participation, but warned GOP members that the same rules would clearly apply to both parties.¹⁶ The White House swiftly

11. Zoe Tillman, *Trump Transformed the Courts. Here's What Biden Could Do.*, BUZZFEED NEWS (Dec. 17, 2020, 4:26 PM), <https://www.buzzfeednews.com/article/zoetillman/trump-judges-appoint-biden-courts> [<https://perma.cc/9WMJ-W5VP>]; Anne E. Marimow & Matt Viser, *Biden Moves Quickly to Make His Mark on Federal Courts After Trump's Record Judicial Nominations*, WASH. POST (Feb. 3, 2021, 7:00 AM), https://www.washingtonpost.com/local/legal-issues/biden-judge-nominations/2021/02/02/e9932f3a-6189-11eb-9430-e7c77b5b0297_story.html [<https://perma.cc/6285-Y3WS>].

12. S. COMM. ON THE JUDICIARY, QUESTIONNAIRE FOR JUDICIAL NOMINEES, RESPONSES OF CANDACE JACKSON-AKIWUMI [hereinafter QUESTIONNAIRE]; Lynn Sweet, *Jackson-Akiwumi Would be Rare Judge Who Was a Public Defender Highlighted at Her Senate Confirmation Hearing*, CHI. SUN-TIMES (Apr. 30, 2021), <https://chicago.suntimes.com/columnists/2021/4/28/22408732/jackson-akiwumi-senate-confirmation-hearing-would-be-rare-judge-public-defender> [<https://perma.cc/R5V3-LP54>].

13. *President Biden Announces Intent to Nominate 11 Judicial Candidates*, *supra* note 3; QUESTIONNAIRE, *supra* note 12.

14. QUESTIONNAIRE, *supra* note 12.

15. Ann E. Marimow, *Biden's Court Pick Ketanji Brown Jackson Has Navigated a Path Few Black Women Have*, WASH. POST (May 4, 2021, 6:00 AM), https://www.washingtonpost.com/local/legal-issues/ketanji-brown-jackson-biden-dc-circuit/2021/04/29/c0bd2f0c-a761-11eb-8d25-7b30e74923ea_story.html [<https://perma.cc/MJ4S-VN8G>]; Sweet, *supra* note 12.

16. Carl Hulse, *Durbin, New Judiciary Chair, Warns Republicans on Blocking Judges*, N.Y. TIMES (Mar. 1, 2021), <https://www.nytimes.com/2021/03/01/us/politics/durbin-senate-judiciary-garland.html> [<https://perma.cc/AX3T-T63R>]; Marianne Levine, *Senate Dems Take a Page from GOP in Nomination Battles*, POLITICO (Feb. 17, 2021, 4:37 PM), <https://www.>

compiled pertinent documents while officially tapping nominees in mid-April.¹⁷ The committee rapidly tendered questionnaires, and Jackson-Akiwumi speedily delivered responsive, cautious answers.¹⁸ The committee granted public notice of the April 28 hearing one week before convening and of the five marshaled nominees two days later.¹⁹

Senate Judiciary Chair Durbin started the hearing by remarking that it was a “historic day,” because everyone mustered was a nominee of color, who represents meaningful “demographic and professional diversity.”²⁰ Ketanji Brown Jackson, a superb D.C. Circuit nominee, and Candace Jackson-Akiwumi offered much robust, careful testimony on the first panel.²¹ The hearing seemed less politicized than for some of Biden’s upper-level executive nominees.²²

However, a few GOP members focused on the nominees’ defense of persons accused with crimes in apparent efforts to criticize the aspirants.²³ For instance, when Chuck Grassley (R-IA), the Ranking Member, determinedly questioned Jackson-Akiwumi regarding her defense of a purported weapons trafficker, the nominee repeatedly claimed that she had an ethical duty to provide vigorous client representation.²⁴ When directly queried whether race might affect jurists’ opinions, she cautiously answered: “I don’t believe

politico.com/news/2021/02/17/court-nominees-democrats-469500 [https://perma.cc/X4DY-NZKA].

17. *Nominations Sent to the Senate*, WHITE HOUSE (Apr. 19, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/19/nominations-sent-to-the-senate-11/> [https://perma.cc/57X5-P6XD].

18. QUESTIONNAIRE, *supra* note 12.

19. Hearing Advisory from S. Comm. on the Judiciary to Hold Hearing on First Slate of White House Judicial Nominations (Apr. 23, 2021).

20. *Nomination Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (Apr. 28, 2021).

21. Fine district picks Julien Neals, Zahid Quraishi and Regina Rodriguez, whom the GOP did not query, were on the second panel. *Hearing, supra* note 20; JUDICIAL VACANCIES, *supra* note 1.

22. Carl Hulse, *The Senate Begins Considering a Diverse Slate of Biden’s Judicial Nominees*, N.Y. TIMES (Apr. 29, 2021), <https://www.nytimes.com/2021/04/29/us/politics/the-senate-begins-considering-a-diverse-slate-of-bidens-judicial-nominees.html> [https://perma.cc/596F-2GE4]; Ann E. Marimow, *Biden Judicial Pick Ketanji Brown 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://perma.cc/F5RE-MXL6].

23. *Hearing, supra* note 20; *see* sources cited *supra* note 22.

24. *Hearing, supra* note 20; *see* Hulse, *supra* note 22.

race will play a role in the type of judge I would be if confirmed,”²⁵ yet stated that “demographic diversity of all types” performs significant roles by enhancing “public confidence in our courts” and citizen acceptance of court decisions’ legitimacy.²⁶ When GOP members requested her views on expanding the High Court’s number and on many Court determinations, she properly and respectfully declined to respond.²⁷

Upon the hearing’s conclusion, Durbin permitted senators a week to proffer questions for the record and nominees seven days to marshal replies.²⁸ Candace Jackson-Akiwumi quickly produced thorough, careful answers.²⁹ Durbin listed the nominees for the initial time on the May 13 notice of an Executive Business Meeting.³⁰ GOP senators requested that nominee consideration be “held over” for a week, as the panel strictures clearly provide.³¹ Across this session, the committee probed and deliberated on a few issues relevant to efficacious federal court service. Once the panel discussed these ideas, the senators voted. Because Jackson-Akiwumi essentially is a highly competent, moderate nominee, who astutely responded to quite a few complicated, pertinent queries during, and following, the hearing, she certainly merited a favorable ballot. Nonetheless, one Republican member voted for the nominee.³² Accordingly, the Chair perceptively forwarded Jackson-Akiwumi to the floor.³³

Chuck Schumer (D-NY), the Majority Leader, will efficiently arrange a confirmation debate and ballot the week of June 14. When Republicans deny unanimous consent to vote on the nominee, the majority party will need to request cloture. Cloture is the

25. *Hearing, supra* note 20; *see Sweet supra* note 12.

26. *Hearing, supra* note 20; *see Hulse, supra* note 22.

27. *Hearing, supra* note 20; *see Sweet, supra* note 12.

28. *Hearing, supra* note 20.

29. *Hearing, supra* note 20 (response to question from Sen. Dick Durbin, Chair, to Judge Ketanji Brown Jackson, Nominee to the United States Court of Appeals for the D.C. Circuit).

30. Notice from S. Comm. on the Judiciary of May 13, 2021, Executive Business Meeting (May 6, 2021).

31. *Executive Business Meeting Before S. Comm. on the Judiciary*, 117th Cong. (May 13, 2021); R.P. U.S. S. COMM. ON THE JUDICIARY 1, <https://www.judiciary.senate.gov/about/rules> [<https://perma.cc/JZ7X-JP5D>].

32. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 117th Cong. (May 20, 2021); *see* Carl Hulse, *Panel Approves First Biden Judicial Picks Over G.O.P. Opposition*, N.Y. TIMES (May 20, 2021), <https://www.nytimes.com/2021/05/20/us/senate-judges-biden.html> [<https://perma.cc/K9J5-JXP4>].

33. S. EXEC. CALENDAR, 117th Cong., 1st Sess. (May 24, 2021).

procedure which acutely ends debate and allows the Senate to vote.³⁴ The Senate ought to mandate cloture, as the nominee is a distinguished, centrist aspirant, who has earned a positive confirmation ballot. After cloture is achieved, the Senate must expeditiously convene a rigorous floor debate and vote.

Numerous reasons—particularly deep respect for Judge Flaum’s decades of invaluable court service, Biden’s election as the President who confirms jurists, and vaunted customs—show why Trump and the GOP Senate properly refrained from directly confirming Flaum’s replacement. Biden sagely and promptly denominated Candace Jackson-Akiwumi to be his successor. The Senate must robustly and immediately conclude processing Jackson-Akiwumi and confirm her because she will be a powerful, mainstream jurist who affords the Seventh Circuit necessary ethnic, gender, ideological, and experiential diversity.

34. S.R. XXII (2021), <https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf> [<https://perma.cc/SLU7-QTYM>].