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COMMENTARY

CONFIRM JULIE RIKELMAN FOR THE FIRST CIRCUIT

Carl Tobias *

Now that the United States Senate has reconvened after pauses for holidays, the upper chamber must expeditiously appoint designee Julie Rikelman to the U.S. Court of Appeals for the First Circuit, which is the smallest, albeit critical, appellate court. The nominee, whom President Joe Biden tapped during late July 2022, would supply remarkable experiential, gender, and ideological diversity gleaned from pursuing much cutting-edge reproductive freedom litigation, which included arguing *Dobbs* before the Supreme Court that overturned *Roe v. Wade*.¹ The nominee has definitely excelled in law's highest echelon over twenty-plus years, most recently as the U.S. Litigation Director in the Center for Reproductive Rights at which she has worked over a decade.² The vacancy that the nominee would fill has been empty for plentiful

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1. Press Release, White House, Off. of the Press Sec'y, President Biden Names Twenty-Fourth Round of Judicial Nominees (July 29, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/29/president-biden-names-twenty-fourth-round-of-judicial-nominees/> [<https://perma.cc/D8GH-R6DW>]; Hannah Albarazi, *Biden's 1st Cir. Pick, Abortion Rights Atty, up Against Clock*, LAW360 (July 29, 2022, 10:58 PM), <https://www.law360.com/articles/1516565/biden-s-1st-circ-pick-abortion-rights-atty-up-against-clock> [<https://perma.cc/SJ88-M7TF>]; Shira Schoenberg, *Biden Nominates Reproductive Rights Lawyer Julie Rikelman as Federal Appeals Court Judge*, COMMONWEALTH MAG. (July 29, 2022), <https://commonwealthmagazine.org/courts/biden-nominates-reproductive-rights-lawyer-julie-rikelman-as-1st-circuit-judge/> [<https://perma.cc/R4WV-KDWJ>].

2. Schoenberg, *supra* note 1 (recounting Rikelman's excellent qualifications).

months. Thus, the Senate needs to promptly confirm the well qualified, mainstream nominee.

The opening arose in early March 2022, when First Circuit Judge Sandra Lynch proclaimed that she intended to assume,³ upon her replacement's confirmation,⁴ the post of senior jurist after a quarter century of distinguished public service.⁵ Lynch appeared to notify Biden previously that she was planning on becoming a senior judge.⁶

The President's White House Counsel relied upon a systematic process to furnish accomplished, moderate candidates for Biden's scrutiny.⁷ The nomination team assembled very talented, centrist prospects whom they had analyzed for this vacancy by thoroughly consulting Massachusetts Democratic Senators Elizabeth Warren and Ed Markey, whose press release in fact declared that they were clearly "enthusiastic to recommend Rikelman" and "strongly support her nomination."⁸ The White House office promptly canvassed, interviewed, and suggested a few dynamic, mainstream choices, notably Rikelman.

When Biden designated the aspirant, he comprehensively and effectively surveyed the pick's multiple impressive qualifications.⁹ From 2006 until 2011, Rikelman satisfied crucial duties as NBC Universal's Vice President of Litigation. From 2004 until 2006, Rikelman was a senior associate with the prestigious law firm, Simpson Thacher & Bartlett. In the preceding three years she

3. Lauren Berg, *1st Circ. Judge Lynch to Take Senior Status*, LAW360 (Mar. 1, 2022, 10:01 PM), <https://www.law360.com/articles/1469651/1st-circ-judge-lynch-to-take-senior-status> [<https://perma.cc/EEU4-VEBT>].

4. Perhaps because Biden nominated Rikelman in August, Lynch assumed senior status in December. *Current Judicial Vacancies*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> [<https://perma.cc/TY9S-PZ3M>] (May 10, 2023).

5. See Berg, *supra* note 3.

6. *Current Judicial Vacancies*, *supra* note 4; see sources cited *supra* note 1. As the former First Circuit Chief Judge, Lynch's respect for the court and its litigants, judges, and staff suggests that the jurist notified Biden earlier that she would become a senior judge.

7. Carl Tobias, *How Biden Could Keep Filling the Federal Circuit Court Vacancies*, 80 WASH. & LEE L. REV. ONLINE 1, 9–10 (2022).

8. See Madison Alder, *Dobbs Lawyer Says She'd Apply Abortion Ruling as U.S. Judge*, BLOOMBERG L. (Sept. 21, 2022, 1:16 PM), <https://news.bloomberglaw.com/us-law-week/dobbs-lawyer-says-shed-apply-abortion-ruling-as-circuit-judge> [<https://perma.cc/ZM5H-HHQ7>] (noting that Rikelman applied for the First Circuit vacancy in April); Press Release, Elizabeth Warren, Warren and Markey Applaud Nomination of Julie Rikelman to United States Court of Appeals for the First Circuit (July 29, 2022), <https://www.warren.senate.gov/newsroom/press-releases/warren-and-markey-applaud-nomination-of-julie-rikelman-to-united-states-court-of-appeals-for-the-first-circuit> [<https://perma.cc/AC6X-6NNZ>].

9. Press Release, *supra* note 1.

practiced with Feldman & Orlansky in Anchorage. Upon graduation, Rikelman competently served as a law clerk, who efficaciously assisted prominent Third Circuit Judge Morton Greenberg after similarly clerking for analogously preeminent Supreme Court of Alaska Justice Dana Fabe.¹⁰

Her record demonstrates that Rikelman constitutes an industrious, ethical, intelligent, careful, and diverse candidate vis-à-vis experience, ideology, and gender, who possesses balanced temperament.¹¹ The nominee captured a well-qualified rating from the American Bar Association Standing Committee on the Federal Judiciary.¹² Rikelman pragmatically exhibited these attributes in testifying before a Senate Judiciary Committee hearing in September, while Democratic members appeared pleased with her comprehensive, nuanced responses. For example, when the astute chair, Senator Dick Durbin, meticulously questioned Rikelman about the high-profile *Dobbs* case, the nominee masterfully replied that she will “‘absolutely’ apply the *Dobbs* decision ‘faithfully,’” because “[o]ur legal system and the rule of law itself depends on lower federal courts [regularly and perspicaciously] following Supreme Court precedent [and now *Dobbs* comprises] the law of the land and I will follow it.”¹³ The chair then effectively sought the designee’s perspective on how the role of judges differs from advocates; she cautiously responded that attorneys dutifully proffer the best conceivable arguments while jurists consider all counsels’ “arguments with an open mind.”¹⁴

Nevertheless, a few GOP senators aggressively pressed Rikelman on her decisions to represent clients during litigation, especially about reproductive health care and other “culture war”

10. She was born in Kiev, immigrated to the U.S. in 1979, and graduated from Harvard College magna cum laude in 1993, and from Harvard Law School cum laude in 1997. *Id.*

11. See sources cited *supra* note 1; *infra* notes 13–14, 17–18, 20–24 and accompanying text. *But see infra* notes 15–16, 18–19, 21–23 and accompanying text.

12. This is the highest rating. One member recused and another abstained. AM. BAR ASS’N STANDING COMM. ON THE FED. JUDICIARY, RATINGS OF ARTICLE III JUDICIAL NOMINEES: 118TH CONGRESS, https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/webratingchart-118.pdf [https://perma.cc/TGQ3-ZAB7] (May 5, 2023).

13. She added “I will follow all Supreme Court precedent.” *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 117th Cong. (Sept. 21, 2022) [hereinafter *Hearing*]; see James Arkin, *1st Circ. Pick Vows to Apply Dobbs ‘Faithfully,’* LAW360 (Sept. 21, 2022, 4:06 PM), <https://www.law360.com/articles/1532249> [https://perma.cc/S6XD-58BU].

14. She relied on judges to “follow the law regardless of their personal views or their previous work experiences,” vowing this is the “kind of judge that [she] would commit to be.” *Hearing, supra* note 13; see Arkin, *supra* note 13.

debates.¹⁵ For instance, acerbic Senator Ted Cruz absurdly contended that the pick had “spent the majority of [her] professional life as an extreme zealot advocating for abortion.”¹⁶ Rikelman firmly countered the Senator’s asinine claim that she preferred to have abortion legal until birth.¹⁷

Despite those cogent answers, several GOP senators concomitantly probed the nominee respecting dimensions of her reproductive health activities. For instance, Senator Mike Lee disputed Rikelman’s perceptive characterization of *Dobbs* as “callous,” when she persuasively argued that the opinion can acutely “relegate women to second-class status,” while the designee peremptorily admonished him that the Justices should “have relied on the precedent set [the past] fifty years.”¹⁸ Senators Chuck Grassley and Josh Hawley caustically questioned her about pregnancy centers, while Grassley did ask whether she would recuse when litigation directly related to the discrete centers.¹⁹ Rikelman pragmatically answered that, were the chamber to dutifully appoint her, she would professionally consult applicable recusal strictures.²⁰

A few members chose to press the nominee about her dated 2007 law review piece that discussed exceptions regarding authority to collect DNA under the Fourth Amendment.²¹ Cruz disgracefully accused Rikelman of supporting pedophiles, Senator Marsha Blackburn disdainfully contended that the nominee practically helped rapists, and Senator Tom Cotton dramatically asserted that Rikelman had partly caused the acceleration of U.S. “crime [last]

15. *Hearing, supra* note 13; *see Alder, supra* note 8; Arkin, *supra* note 13; Brad Kutner, *Julie Rikelman, Attorney Who Defended Abortion at Supreme Court, Lambasted by Republicans in Confirmation Hearing*, NAT’L L. J. (Sept. 21, 2022, 1:47 PM), <https://www.law.com/nationallawjournal/2022/09/21/julie-rikelman-attorney-who-defended-abortion-at-supreme-court-lambasted-by-republicans-in-confirmation-hearing/> [<https://perma.cc/Q74P-T6N5>].

16. “That is clearly a heartfelt and personal passion.” *Hearing, supra* note 13; *see Alder, supra* note 8.

17. She expressly denied assuming this position: “No Senator, as an advocate, I always worked within Supreme Court precedent.” *Hearing, supra* note 13; Alder, *supra* note 8; Arkin, *supra* note 13.

18. Lee quoted from her Center’s post-*Dobbs* report, “in every sentence” of which she was “not an expert.” Rikelman added her testimony reiterated arguments that she made to the Justices and as an advocate. *Hearing, supra* note 13; Kutner, *supra* note 15; *see infra* note 26.

19. The nominee explained that she was concerned, because evidence showed that these centers had misled some women. *Hearing, supra* note 13; *see Arkin, supra* note 13; *see also Alder, supra* note 8.

20. *Hearing, supra* note 13; *see Arkin, supra* note 13; 28 U.S.C. § 455 (recusal statute).

21. *See Hearing, supra* note 13; *see also* Arkin, *supra* note 13; Julie Rikelman, *Justifying Forcible DNA Testing Schemes Under the Special Needs Exception to the Fourth Amendment: A Dangerous Precedent*, 59 BAYLOR L. REV. 41 (2007).

seen [in] the 90s.”²² The designee replied that the paper made the argument for a “special needs exception,” but Cotton dismissively alleged that it more broadly probed the legality of collecting DNA samples.²³ The nominee recalled that the piece stressed the exception yet vowed to “accept the Court’s interpretation and . . . the Court’s Fourth Amendment precedent.”²⁴

On December 1, the Committee rigorously deliberated over Rikelman’s salient capabilities which yielded a deadlocked result, mainly because the parties and the country sharply disagree on abortion, notwithstanding her profound competence.²⁵ Democratic and GOP senators’ perspectives closely mirrored notions which they had espoused in the hearing. For example, Grassley argued that “Rikelman ha[d] spent much of her legal career as an activist litigating cases against state law regulating abortion,” but it is now concerning that the aspirant’s “personal opinion may cloud how she views facts.”²⁶ Durbin responded by describing Rikelman as “exceptional”; the panel chair urged that the designee’s activism would not color how she treats matters when a judge, while nominee “Rikelman advocated a mainstream position in [staunchly] defending *Roe v. Wade* . . . a 50-year precedent decided 7–2 by the [Justices which powerfully challenged] laws that sought to prevent women from accessing reproductive health care.”²⁷ At the 117th Congress’ end, there was insufficient time for appointing this nominee or many other prominent, centrist Biden aspirants, so the can-

22. See *Hearing*, *supra* note 13; see also Kutner, *supra* note 15.

23. She was replying to Grassley. See *Hearing*, *supra* note 13; see also Rikelman, *supra* note 21, at 43; Arkin, *supra* note 13.

24. See *Hearing*, *supra* note 13; see also Kutner, *supra* note 15.

25. *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 117th Cong. (Dec. 1, 2022) [hereinafter *Executive Business Meeting*] (documenting 11–11 vote); see Nate Raymond, *U.S. Senate Panel Deadlocks on Abortion Rights Lawyer’s Judicial Nomination*, REUTERS (Dec. 8, 2022, 1:17 AM), <https://www.reuters.com/legal/government/us-senate-panel-deadlocks-abortion-rights-lawyers-judicial-nomination-2022-12-01/> [<https://perma.cc/95YT-EVTH>]; Avalon Zoppo, *Senate Committee Deadlocks on Nomination of Lawyer Who Argued for Abortion Clinic in ‘Dobbs’ Case*, NAT’L L. J. (Dec. 1, 2022, 11:46 AM), <https://www.law.com/nationallawjournal/2022/12/01/senate-committee-deadlocks-on-nomination-of-lawyer-who-argued-for-abortion-clinic-in-dobbs-case/> [<https://perma.cc/P7WH-F73W>]; see also sources cited *supra* note 13.

26. Lee echoed Cruz and Grassley. “When [nominees] step out of the role of attorney advocate and into the role of attorney activist, they should answer for their claims.” *Executive Business Meeting*, *supra* note 25; Zoppo, *supra* note 25.

27. He also said that Rikelman testified she would follow *Dobbs* and all Court precedent as the “law of the land.” *Executive Business Meeting*, *supra* note 25; see *supra* note 12; Raymond, *supra* note 25.

didates' nominations duly expired in early January 2023.²⁸ Accordingly, Biden renamed myriad nominees during that month.²⁹ The panel then reported her on February 9.³⁰

Similar ideas elucidate why the chamber must promptly appoint the nominee. First, Judge Lynch's court vacancy has been open more than a year. Second, the President did name Rikelman plenty of months ago. Demanding that well-qualified candidates and nominees wait protracted times can unfairly mean that specific individuals need to put their lives and careers on hold. This might be salient for nominee Rikelman, who presently discharges ample vital reproductive health care duties. Third, the vacant slot essentially requires that Lynch and her colleagues dispose of abundant cases, although plentiful senior jurists have responsibility for considerably fewer appeals.³¹ This judge has kept productively maintaining and deciding a significant number of matters, which permits the tribunal to continue swiftly, inexpensively, and equitably resolving a large docket.³² Numerous parties, counsel, and citizens are clearly indebted to the experienced jurist for robust ongoing service. However, the delay and politicized conflicts, which involved Republican and Democratic senators and may have left her

28. 169 CONG. REC. S29 (daily ed. Jan. 3, 2023); S. Doc. No. 113-18, at 43–44 (2013) (mandating nominees' return to the President); see Madison Alder, *Dozens of Biden Judicial Nominations Returning to White House*, BLOOMBERG (Dec. 23, 2022, 4:45 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X41TSB2K000000?bna_news_filter=us-law-week#jcite [<https://perma.cc/PW59-YPBR>].

29. President Biden renamed Rikelman and many other able centrists the identical day. 169 CONG. REC. S26 (daily ed. Jan. 3, 2023); see Press Release, White House, Off. of the Press Sec'y, *Nominations Sent to the Senate* (Jan. 3, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/03/nominations-sent-to-the-senate-91/> [<https://perma.cc/LR65-7RU7>]; Nate Raymond, *Biden Renominates 25 Judicial Nominees, Including Longest Pending Ones*, REUTERS (Jan. 3, 2023, 6:24 PM), <https://www.reuters.com/legal/government/biden-renominates-25-judicial-nominees-including-longest-pending-ones-2023-01-03/> [<https://perma.cc/PPH2-ACD8>].

30. Durbin admonished “there’s no presumption that if you didn’t make it on the calendar, you’re damaged goods [because] we just run out of time,” noting analogous backlogs in former President Donald Trump’s tenure. She earned an 11–10 vote. *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 118th Cong. (Feb. 9, 2023); see *Executive Business Meeting to Consider Pending Legislation and Nominations Before the S. Comm. on the Judiciary*, 118th Cong. (Feb. 2, 2023) (holding over for one-week votes on many nominees, including hers, as panel Rule 1 allows and the minority did).

31. See Marin K. Levy, *The Promise of Senior Judges*, 115 NW. U. L. REV. 1227, 1233 (2021); David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 461–63 (2007); Xiao Wang, *The Old Hand Problem*, 107 MINN. L. REV. 971, 972 (2023).

32. 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, 1326 (1995).

opening empty, could be rather inequitable to the dedicated public servant who plainly earned a senior judgeship plenty of weeks ago.

Now that the chamber has reassembled, able Majority Leader Chuck Schumer needs to immediately provide a floor debate and confirmation ballot, which appoints Julie Rikelman to the First Circuit vacancy that has long been unfilled. Her distinguished record means that the accomplished, diverse nominee merits speedy confirmation, and Rikelman's capabilities will allow the tribunal to keep promptly, economically, and fairly concluding its substantial appeals.