

## HOW BIDEN CAN CONTINUE MAKING THE FEDERAL COURTS BETTER

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*From 2017 until 2020, former President Donald Trump and the Republican Senate majority nominated and confirmed record-breaking numbers of appellate court judges. This emphasis undermined ethnic, gender, sexual orientation, and experiential diversity as well as ideological balance on these courts and neglected to address persistent district court and emergency vacancies. Moreover, to achieve these historic confirmation levels, the GOP Senate majority eviscerated or altered certain rules and customs of regular order, which included the creation of a circuit-level exception to the blue slip process. President Joe Biden, in turn, has pledged to rectify the damage to the courts and the judicial selection process wrought by the Trump Administration.*

*This Article provides an overview of the recent historical and political context regarding judicial nominations and confirmations followed by an examination of the nomination and confirmation processes deployed by President Trump and the Senate majorities in the 115th and 116th Congress. Next, the Article explores the nomination and confirmation processes that have been employed thus far by the Biden Administration and the Democratic Senate majority. These processes include emphasis on openings at the appellate court level and intentionally nominating candidates who are diverse in terms of ethnicity, gender, sexual orientation, ideology, and experience. The quintessential illustration is the confirmation of the first Black woman to the Supreme Court, Justice Ketanji Brown Jackson.*

*Finally, the Article proffers both short-term and long-term suggestions respecting how the Biden Administration might continue to improve the judicial selection process and the courts. Short-term suggestions include elevating magistrate, state-level, and district court judges; renaming qualified Obama nominees whom the Senate did not confirm; and maintaining or*

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*expanding the blue slip exception for the time being. Long-term suggestions include clarifying and codifying the Leahy Rule and instituting a bipartisan judiciary. Having maintained Democrats' Senate majority in the 2022 elections, which happened shortly after the writing of this article, President Biden and the Democratic senators may have the opportunity to implement these suggestions in the near future.*

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INTRODUCTION

In many dimensions of public life, President Joe Biden pledged to rectify the striking damage to American society, the federal government, and especially the federal courts provoked by former President Donald Trump and the Republican Senate majorities in the 115th and 116th Congress. Trump and the last few Republican upper chamber majorities detrimentally affected the federal courts, which have perennially served as the Republic's crown jewels. The nomination and confirmation processes that the GOP White House and chambers effectuated coupled with the many conservative judges whom they appointed, undercut diversity in terms of ethnicity, gender, sexual orientation, circuit ideology, experience, and the practices that govern court selection. The GOP processes also undermined citizen perspectives regarding discharge of responsibility for the judicial nomination and confirmation processes, the presidency, the Senate, the courts, and the rule of law. The first candidates whom Biden deftly nominated, and the (now-Democratic) chamber approved, respected his vow to

confine the Trump appointments' deleterious ramifications.<sup>1</sup> Thus, the difficulties that Trump created—and the ways that Biden has attempted to remedy them during the 117th Congress—deserve analysis.

When Trump competed for President in 2016, the candidate repeatedly promised that he would “make the federal courts great again.” He seated exceedingly conservative, young, and competent nominees, perspectives on which most of the GOP senators and the Majority Leader, Mitch McConnell (KY), agreed. Trump and McConnell constantly reminded the populace of these nomination and confirmation successes. For instance, the Republicans promptly approved multiple extremely conservative Supreme Court Justices and fifty-four analogous circuit jurists, filling *all* 179 courts of appeals positions that Congress authorizes, leaving the fewest appellate court vacancies since Ronald Reagan's presidency.

However, those efforts inflicted costs on the bench and the country. For example, district courts, which Trump neglected to fill as aggressively as circuit courts, currently face seventy-six open posts out of 677 positions that Congress has authorized. Twenty-six of these posts constitute “judicial emergencies.” This resembles the situation at the time of Trump's inauguration. The chief executive also adopted measures that degraded the nomination and confirmation procedures as well as longstanding conventions and requirements that contemporary White Houses followed that have consistently regulated the appointment of mainstream nominees.

The courts were highly respected *prior to* Trump's 2016 election. Nevertheless, Trump's endeavors to purportedly improve the courts had the opposite effect. His efforts undermined public confidence in tribunals and the other government branches. Therefore, Trump's missteps and Biden's subsequent efforts to counter the impacts of Trump's endeavors merit scrutiny.

Part II of this Article briefly assesses the origins and development of the judicial selection process. The second portion surveys how Trump, as a presidential candidate, attempted to deploy the federal courts politically by pledging their enhancement across 2016 and

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1. Press Release, White House, Off. of the 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/2FUV-D8KN]; Carl Hulse & Michael D. Shear, *Biden Names Diverse Nominees for the Federal Bench*, N.Y. TIMES (Jun. 14, 2021), <https://www.nytimes.com/2021/03/30/us/politics/biden-judges.html>; see *infra* note 95 and accompanying text.

while pursuing citizen support for his troubled presidency and 2020 reelection bid. Illustrations of these attempts include the former chief executive's vows that he would make the judiciary great "again" by confirming numerous extremely conservative jurists. Trump set records for approving court of appeals judges—many of whom possess stunningly conservative ideological views on executive power, the modern "administrative state," and the "culture wars"—despite ignoring the monumental 150 trial-level vacancies, the rampant growth of judicial emergencies, and the relatively minuscule number of confirmations of diverse nominees. These deleterious actions were primarily evidenced in "blue" states, with Democratic chamber representation.

Trump also contravened, altered, or underemphasized constructive rules and customs for selecting nominees. For instance, he minimally consulted politicians from states which encountered openings, although they intrinsically knew of more qualified prospects. Trump stymied American Bar Association (ABA) participation in the selection nomination process, as his White House declined to consider most effective ABA investigations and ratings of nominees and candidates. Other than former Presidents George W. Bush and Trump, Presidents in office since Dwight Eisenhower have relied substantially on ABA participation. Trump correspondingly eschewed endeavors that identify, canvass, nominate, and confirm ethnic minorities; LGBTQ individuals; or persons with valuable, if less conventional, legal experience, notably those representing many individuals accused of crimes. Finally, Trump even publicly scolded revered jurists as "so-called" and "Obama" judges for invalidating his political efforts while castigating their opinions, which he argued jeopardized national priorities.

The Republican Senate majorities, in turn, created a "circuit exception" to the venerable blue slip policy, which had required that both home-state senators approve a nomination before the confirmation process could proceed. Application of the blue slip policy to appeals courts permitted GOP senators in jurisdictions that encountered appellate court vacancies to halt many well-qualified nominees during President Barack Obama's eight years (the most recent applicable precedent). Judiciary Committee hearings lacked substantial rigor because the panel majority did not contemplate instructive ABA material or encourage robust nominee inquiry or discussion ahead of ballots. These changes allowed more controversial nominees to obtain party-line committee and confirmation votes.

Part III of this article explores the consequences of those specific activities. Trump and McConnell continually emphasized that the GOP had appointed a record number of conservatives to the federal appellate courts, who comprise practically one third of the appeals court bench and may serve for decades. Both politicians capitalized on these successes to advance their political fortunes. However, each disregarded the Republicans' failure to fill many trial-level and emergency federal court vacancies as well as the party's reluctance to confirm diverse individuals. These phenomena were especially prevalent in jurisdictions that Democrats represented. Republican senators were able to fill many appellate court seats by violating or altering some effective customs and practices, namely circuit blue slips. Those practices pointedly undercut regular order in the confirmation process. These Republican measures not only undermined the constitutional responsibilities of the executive and the Senate in the judicial selection process, but they also weaken the critical obligation of the circuit and district court bench to decide their substantial caseloads promptly, inexpensively, and equitably. Moreover, Trump attacked jurists who overturned his illegitimate endeavors to govern in a manner that the former President believed would expand his reelection chances. Trump's aggressive criticisms further politicized the courts and ultimately eroded public trust in the executive, the Senate, the judiciary, the rule of law, and the nomination and confirmation procedures for judges.

Part IV considers how President Biden and the Democratic Senate majority have started to combat the adverse effects imposed on the courts by the practices discussed above that Trump and both Republican Senate majorities employed. Focusing on the selection procedures that Biden and the Senate majority in the 117th Congress designed to expeditiously nominate and confirm the initial group of five well-qualified, moderate nominees, this section demonstrates how the cohort's smooth processing allowed Biden to appoint forty-two jurists in his first year and forty-one judges thus far in the President's second year while nominating 140 candidates. The nominees' compelling diversity in terms of ethnicity, gender, sexual orientation, ideology, and experience along with the partial reinstatement of regular order to nominate and confirm the preeminent individuals proved successful and must continue. However, Biden and the Democratic chamber majority have elected to retain a small number of the GOP approaches to judicial nomination and confirmation adopted during the Trump presidency.

Because Part III of this article suggests that the mechanisms on which Trump and GOP chambers relied undercut the normal selection

practices, the final segment explores measures that are available to President Biden and the Senate. Disruption of powerful conventions and circuit ideological balance, which Trump and both Republican Senate majorities effectuated, demonstrates that the new President and Senate must first restore diversity in the courts, partly by using mechanisms that resemble devices that Republicans applied to eviscerate diversity. Democrats should then reestablish true, dynamic, regular order that the GOP eroded. This development would include revitalizing effective devices. These devices notably include meticulous consultation of politicians from home states and constructive ABA participation in selection. Both political parties also ought to refrain from conduct that may undermine citizen regard for both the nomination and confirmation procedures as well as the government branches, such as positing nominee questions that lack direct relevance or relying on corrosive litmus tests. Senators should revive comprehensive panel hearings, searching committee deliberations, and robust Senate confirmation debates while eliminating or reducing problematic lock-step voting.

The 2020 election granted Democrats a nascent presidency and a razor-thin Senate majority. Those changes indicate that now would be a propitious occasion for most Republican and Democratic legislators to contemplate immediately prescribing a bipartisan judiciary. Neither party can be certain who will win the Senate in November of 2022, and thereafter the chamber majority and chief executive office two years later. Accordingly, either party may profit in subsequent years from the system crafted. A bipartisan judiciary would allow the party that lacks White House control to submit a percentage of nominees. This action can be linked to a bill authorizing seventy-seven new trial-level posts which the Judicial Conference of the United States recommended that lawmakers approve (the federal court policymaking arm grounds this sound proposition in conservative approximations of case and workloads). Tethering bipartisan courts to new judicial slots would enhance the parties' incentives to collaborate, promote diversity, and enlarge the number of tribunal jurists.

Should a Republican chamber minority oppose the suggestions to revitalize and thoroughly effectuate critical diversity requisites, including circuit ideological equilibrium and distinctive regular order, both parties' senators still might want to implement practices that enhance the White House nomination and the Senate confirmation procedures. The Democrats could retain the disputed appeals court blue slip exception and other Republican strictures, as the majority has currently done, pending the comprehensive restoration of diversity fac-

tors, if (1) the minority refuses to cooperate with Biden's solicitous nomination of capable, mainstream designees for empty appellate tribunal positions, or (2) the GOP neglects to coordinate and fill district court openings.

Should Democrats aspire to reinvigorate the diversity of the courts, specifically through expanded appellate court ideological balance and a return to regular order, they may need to continue applying discrete pragmatic alternatives that the GOP recently depended on, such as: majority nominee and cloture confirmation ballots, minimal early ABA involvement, and the circuit blue slip exception. Once the chamber has restored diversity, Republicans and Democrats must carefully review and implement longer-term reforms that encompass the selection process such as the permanent implementation of bipartisan courts.

## I.

### CONTEMPORARY APPOINTMENTS COMPLICATIONS

Many historical problems trouble the selection process, but two issues are most relevant to the present situation. One problem is the dilemma caused by persistent vacancies, which results from enlarged federal court jurisdiction, litigation, and judgeships.<sup>2</sup> The second more contemporary difficulty is politics, and could be ascribed to conflicting White House and Senate party control beginning around 1980.

#### A. *Persistent Vacancies*

Congress massively enhanced federal court jurisdiction after the 1950s;<sup>3</sup> the House and Senate recognized substantially more civil actions while also criminalizing greater activity. These elements increased district court filings and appeals.<sup>4</sup> Congress addressed the rise

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2. The persistent vacancies difficulty warrants comparatively limited analysis in this article. Delay is inherent in the nomination and confirmation systems, defies felicitous solution, and has already received relatively comprehensive assessment. See Gordon Bermant, Jeffrey Hennemuth & A. Fletcher Mangum, *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 *MISS. C. L. REV.* 319 (1994); see also MILLER CENTER COMM'N NO. 7, REPORT OF THE COMMISSION ON THE SELECTION OF FEDERAL JUDGES (1996) [hereinafter MILLER CENTER REPORT].

3. See MILLER CENTER REPORT, *supra* note 2, at 3; see generally Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 *CORNELL L. REV.* 1264, 1268-70 (1996).

4. *E.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

in cases by expanding appeals court and district court judicial seats.<sup>5</sup> In the fifteen years ahead of 1995, confirmation periods lengthened.<sup>6</sup> For example, appellate court nominations consumed one year and confirmations lasted three months. Both grew.<sup>7</sup> Conditions deteriorated after this, however. For instance, circuit nominations required twenty months and appointments demanded six months from the first year of President Bill Clinton's second term until the first year of President George W. Bush's starting term.<sup>8</sup>

Copious nomination and confirmation procedural steps and the substantial number of participants foster considerable inherent delay.<sup>9</sup> Most Presidents consult senators who represent jurisdictions that face vacancies, pursuing edification of potential candidates. Some politicians deploy bipartisan merit selection panels which screen picks and send prominent submissions. The FBI directs extensive background checks. The ABA comprehensively evaluates and rates counsel.<sup>10</sup> The Department of Justice (DOJ) scrutinizes individual candidates and prepares nominees whom the President suggests for Senate review. The Judiciary Committee assesses prospects, schedules hearings, discusses candidates, and conducts votes. Those whom the panel reports out of committee might have Senate floor debates when necessary, preceding confirmation ballots.

### B. Increased Partisanship

Article II of the U.S. Constitution presumes that senators will effectively moderate ill-advised White House nominations. Although partisanship has long accompanied selection,<sup>11</sup> politicization signifi-

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5. See 28 U.S.C. §§ 44, 133 (2012); see generally Carl Tobias, *Keep the Federal Courts Great*, 100 B. U. L. REV. ONLINE 196, 201 (2020).

6. See Bermant, Hennemuth & Mangum, *supra* note 2, at 323, 329-32; see also JUD. CONF. OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 103 (Dec. 1995).

7. Bermant et al., *supra* note 2, at 329-31.

8. See, e.g., Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 904-08 (2005); see generally Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL'Y 1035 (2009).

9. See Bermant et al., *supra* note 2. See generally Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living Up to Them?*, 7 FORUM, no. 1, 2009.

10. See AM. BAR ASS'N, STANDING COMM. ON FED. JUDICIARY: WHAT IT IS AND HOW IT WORKS (2020), [https://www.americanbar.org/groups/committees/federal\\_judiciary/](https://www.americanbar.org/groups/committees/federal_judiciary/) [<https://perma.cc/XB33-XJ62>]; see generally *infra* note 34 and accompanying text.

11. See THE FEDERALIST No. 76, at 513 (Alexander Hamilton); see generally MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL



cantly expanded when President Richard Nixon insisted that he would promote “law and order” with the appointment of “strict constructionists.”<sup>12</sup> The polarization drastically grew even more after United States Court of Appeals for the District of Columbia Circuit Judge Robert Bork’s acrimonious Supreme Court imbroglio.<sup>13</sup> The combination of skyrocketing politicization, divided government, and the eternal hope that the political party lacking White House control may regain it promoted delay.

Relatively tardy nominations might explain appointments’ chronic dearth. In early 1997 and 2001 respectively, Presidents Clinton and George W. Bush marshaled rather few circuit suggestions and the opposition party dramatically criticized a number.<sup>14</sup> Legislators who recommended candidates slowed the pace.<sup>15</sup> Bush’s minimal consultation with senators stalled nominations,<sup>16</sup> and delayed GOP processing of Clinton submissions, apparently triggered paybacks during Bush’s presidency.<sup>17</sup> The committee bore certain responsibility, as the panel slowly perused, convened hearings for, discussed, and voted on many nominees.<sup>18</sup> However, over 1997 and 2001, few jurists cap-

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AND HISTORICAL ANALYSIS 28 (rev. ed. 2003); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997).

12. See GOLDMAN, *supra* note 11, at 198; DAVID M. O’BRIEN, *JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION* 20 (1988).

13. See, e.g., MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NOMINATION TO THE SUPREME COURT* (1992); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 18 (2007).

14. See, e.g., Press Release, White House, Off. of the Press Sec’y, *President Clinton Nominates Twenty-Two to the Federal Bench* (Jan. 7, 1997); see also Press Release, White House, Off. of the Press Sec’y, *Remarks by the President During Federal Judicial Appointees Announcement* (May 9, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/05/text/20010509-3.html>.

15. The GOP demanded input and certain Republican senators even proposed candidates. Neil A. Lewis, *Clinton Has a Chance to Shape the Courts*, N.Y. TIMES (Feb. 9, 1997), <https://www.nytimes.com/1997/02/09/us/clinton-has-a-chance-to-shape-the-courts.html>; see 143 CONG. REC. 4,254 (1997) (statement of Sen. Biden); *infra* note 36.

16. See Elliot E. Slotnick, *Appellate Judicial Selection During the Bush Administration: Business as Usual or a Nuclear Winter?*, 48 ARIZ. L. REV. 225, 234 (2006).

17. Paul A. Gigot, *How Feinstein Is Repaying Bush on Judges*, WALL ST. J. (May 9, 2001), <https://www.wsj.com/articles/SB989369905566856183>; Neil A. Lewis, *Party Leaders Clash in Capitol Over Pace of Filling Judgeships*, N.Y. TIMES (May 10, 2001), <https://www.nytimes.com/2002/05/10/us/party-leaders-clash-in-capitol-over-pace-of-filling-judgeships.html>.

18. Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 742 (1997) (documenting that the Judiciary Committee previously conducted one appellate court nominee hearing each month but convened

tered approval primarily because of deficient resources and ideological opposition to their candidacies.<sup>19</sup> Moreover, pressing Senate business and the unanimous consent requirement that enabled any member to stall confirmation ballots delayed numerous floor votes.<sup>20</sup>

Recent selection processes exacerbated these phenomena. During President Obama's tenure, obstruction reached novel heights as demonstrated by the unprecedented GOP 2016 refusal to consider Obama's accomplished High Court nominee, United States Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland.<sup>21</sup> Once the GOP assumed a 2015 chamber majority and pledged to dutifully follow regular order, the Republicans appointed merely twenty Obama lower-court nominees—the fewest since Harry Truman's presidency—which left more than 100 empty slots at Trump's inauguration.<sup>22</sup> Given how egregiously the GOP treated Obama nominees, it was predictable that Democrats might respond, for example, by seeking cloture and roll call ballots on virtually all Trump candidates. Moreover, both parties seem to increasingly practice lock-step voting in the committee and on the floor.

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two each month when the Congress was in session throughout 1987-94 when Biden served as the Chair).

19. See Neil A. Lewis, *Bush and Democrats in Senate Trade Blame for Judge Shortage*, N.Y. TIMES (May 4, 2002), <https://www.nytimes.com/2002/05/04/us/bush-and-democrats-in-senate-trade-blame-for-judge-shortage.html>.

20. See Jennifer Bendery, *Republicans Still Find Ways to Stall Judicial Nominees Despite Filibuster Reform*, HUFFINGTON POST (Feb. 10, 2014), [https://www.huffpost.com/entry/republicans-judicial-nominees\\_n\\_4748528](https://www.huffpost.com/entry/republicans-judicial-nominees_n_4748528); see also *infra* notes 61-62, 68, 110 and accompanying text.

21. 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); see also Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089 (2017); see generally John P. Collins, Jr., *Judging Biden*, 75 SMU L. REV. F. 150 (2022); Ian Millhiser, *Biden's fight to de-Trumpify the courts, explained*, VOX (July 31, 2021), <https://www.vox.com/22587059/joe-biden-courts-judicial-nominations-donald-trump-supreme-court-barack-obama>.

22. See ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Confirmations for December 2016, 114th Congress (last updated Dec. 1, 2016); 163 CONG. REC. S8022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Patrick Leahy & Dianne Feinstein); see also Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12 (2016) (documenting the Republican Senate majority's insistence that Republicans would restore regular order—the system which allegedly governed before the Democratic majority ostensibly eroded regular order—but that the GOP majority neglected to restore regular order after recapturing the Senate in 2014).

## II.

## TRUMP ADMINISTRATION JUDICIAL SELECTION

A. *Nomination Process*

Throughout the 2016 presidential campaign, Trump strongly promised to seat and nominate conservatives for the federal courts. He honored those pledges by selecting and confirming Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett for the Supreme Court while assembling and confirming myriad similar circuit court nominees.<sup>23</sup> The Trump White House established appeals court records by marshaling twelve jurists in the first year, eighteen in the next, and twenty more in 2019,<sup>24</sup> although his administration nominated comparatively few district court candidates during the first half of Trump's presidency.

Trump invoked certain previously well-regarded traditions even as his administration ignored, changed, or downplayed additional effective conventions. For instance, Trump assigned chief appointments responsibilities to the initial White House Counsel, Donald McGahn (as each contemporary president has done), granted numerous related duties to the DOJ, delegated substantial responsibility for trial court openings to politicians who represented home states, and emphasized appellate court vacancies.<sup>25</sup>

In presenting appellate-level candidates, the Counsel accentuated conservative perspectives and youth. For example, the Counsel

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23. See ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Confirmations, 115th Congress (last updated Dec. 1, 2018); see also Tom McCarthy, *Trump's Judges: A Revolution to Create a New Conservative America*, GUARDIAN (Apr. 28, 2020), <https://www.theguardian.com/us-news/2020/apr/28/donald-trump-judges-create-new-conservative-america-republicans>; Russell Wheeler, *Judicial Appointments in Trump's First Three Years: Myths and Realities*, BROOKINGS: FIXGOV (Jan. 28, 2020), <https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-realities/>; *infra* notes 36-38 and accompanying text.

24. See ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Confirmations, 115th Congress (last updated Dec. 1, 2018); see generally Tobias, *supra* note 5, at 204-05 (documenting initial-year appointments of other Presidents); Tom McCarthy, *Why Has Trump Appointed So Many Judges - And How Did He Do It?*, GUARDIAN (Apr. 28, 2020).

25. See Philip Rucker, Josh Dawsey & Ashley Parker, *'He's Not Weak Is He?': Inside Trump's Quest to Alter the Judiciary*, WASH. POST (Dec. 19, 2017); Michael Schmidt & Maggie Haberman, *McGahn, Soldier for Trump and Witness Against Him, Leaves White House*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/us/politics/don-mcgahn-leaves-trump-administration.html> (documenting McGahn's resignation in October 2018 and Patrick Cipollone's replacement of him); see also Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2240 (2013).

deployed litmus tests, which included concerns regarding a broad range of “culture war” issues and the modern administrative state. McGahn ultimately drew primarily on the “short list” of twenty-one possible Supreme Court picks whom the Federalist Society had assembled.<sup>26</sup> These conservative principles governed throughout Trump’s presidency while Leonard Leo, the Federalist Society Executive Vice President, guided judicial selection.<sup>27</sup> No President before had vested such mammoth power in a non-governmental organization.<sup>28</sup> Trump overemphasized filling the appellate courts, which are crucial because they are the tribunals of last resort for practically

26. The Trump Administration and White House Counsel approach differed in kind with most of the previous contemporary Democratic Administrations but even in degree with many prior modern Republican Administrations. See Jeffrey Toobin, *Full Court Press*, NEW YORKER, Apr. 17, 2017, at 24; Donald McGahn, II, *A Brief History of Judicial Appointments From the Last Fifty Years Through the Trump Administration*, 60 WM. & MARY L. REV. ONLINE 105, 106 (2019); Jeremy Peters, *Trump’s New Litmus Test: Shrinking ‘the Administrative State’*, N.Y. TIMES (Mar. 26, 2018); Rebecca Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *Trump Stamps G.O.P. Imprint on the Courts*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html>; Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here’s How*, N.Y. TIMES (Nov. 12, 2017), <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html>; see also *infra* note 77 and accompanying text.

27. See Robert O’Harrow, Jr., & Shawn Boburg, *Inside A Conservative Activist’s-Behind-the-Scenes Campaign to Remake the Nation’s Courts*, WASH. POST (May 21, 2019); Zoe Tillman, *After Eight Years on the Sidelines, This Conservative Group Is Primed to Reshape the Courts Under Trump*, BUZZFEED NEWS (Nov. 20, 2017), <https://www.buzzfeednews.com/article/zoetillman/after-eight-years-on-the-sidelines-this-conservative-group>; see also Jimmy Hoover, *Federalist Society Exec Leonard Leo Starts Consulting Firm*, LAW360 (Jan. 7, 2020), <https://www.law360.com/articles/1232274/federalist-society-exec-leonard-leo-starts-consulting-firm> (documenting that Leo resigned as the Federalist Society Executive Vice President but remained as the principal Trump judicial selection advisor); see generally DAVID ENRICH, *SERVANTS OF THE DAMNED: GIANT LAW FIRMS, DONALD TRUMP, AND THE CORRUPTION OF JUSTICE* (2022); Debbie Stabenow, Chuck Schumer, Sheldon Whitehouse, DEMOCRATIC POL’Y & COMM’N COMM., *CAPTURED COURTS: THE GOP’S BIG MONEY ASSAULT ON THE CONSTITUTION, OUR INDEPENDENT JUDICIARY, AND THE RULE OF LAW*, 18-36 (2020), <https://www.democrats.senate.gov/imo/media/doc/Courts%20Report%20-%20FINAL.pdf>.

28. Jason DeParle, *Debating the Subtle Sway of the Federalist Society*, N.Y. TIMES (Aug. 1, 2005), <https://www.nytimes.com/2005/08/01/politics/politicsspecial1/debating-the-subtle-sway-of-the-federalist.html>; Neil Lewis, *Conservative Lawyers Voice Abundant Joy*, N.Y. TIMES (Nov. 13, 2004), <https://www.nytimes.com/2004/11/13/politics/conservative-lawyers-voice-abundant-joy.html>; Don McGahn, Keynote Remarks at Federalist Soc’y Convention, at 40:50-41:20 (Nov. 17, 2017) [hereinafter McGahn Remarks], <https://www.c-span.org/video/?437462-8/2017-national-lawyers-convention-white-house-counsel-mcgahn> (denying that Trump outsourced selection because the President “insourced” appointments responsibilities to McGahn). President George W. Bush relied substantially, especially when his administration was nominating and confirming Supreme Court Justices and appellate court judges, on Leo.

every case, the courts articulate significantly greater policy than district courts, and their judges issue rulings which affect multiple states.<sup>29</sup> Trump's appeals court nominees were extraordinarily conservative, young, and well-qualified.

The Trump Administration White House also rejected or diluted certain revered appointment traditions. Essential to this disregard of process was minimal consultation of state politicians, an effective custom on which all other contemporary White Houses significantly depended. Consultation of home-state politicians is one crucial reason for blue slips, which only permitted hearings when *each* senator from a jurisdiction proffered slips throughout the Obama Administration. Democrats claimed that Trump and the first White House Counsel engaged in negligible active consultation regarding appeals court posts while McGahn argued that the Constitution does not address consultation, even though virtually all contemporary presidents have actively consulted home-state senators.<sup>30</sup> For example, Senator Tammy Baldwin (D-WI) accused President Trump of supporting a Seventh Circuit nominee who lacked adequate votes of a bipartisan merit selection

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29. See GOLDMAN, *supra* note 11; see generally Tobias, *supra* note 25, at 2240-41; 163 CONG. REC. S8023-24 (daily ed. Dec. 14, 2017) (statement of Sen. Dianne Feinstein). To be sure, Republican Presidents have generally nominated relatively conservative judges and Democrats have generally nominated rather moderate or liberal judges. However, Trump's appellate nominees and confirmees were more uniformly deeply ideologically conservative and younger than nominees and confirmees of his Republican predecessors and Trump focused more comprehensively and aggressively on filling appeals court vacancies to the detriment of district court openings.

30. Most prior contemporary Democratic presidential administrations vigorously consulted home-state Democratic and Republican senators. Most prior modern Republican presidential administrations also robustly consulted home-state senators of both parties. Indeed, McGahn even vigorously consulted the California Democratic Senators Dianne Feinstein and Kamala Harris regarding district court vacancies, although the White House Counsel only nominally consulted the senators respecting Ninth Circuit vacancies assigned to California. See generally *infra* notes 42, 205 and accompanying text; Thomas Kaplan, *Trump Is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/us/politics/trump-judges.html>; Zoe Tillman, *Here's How Trump Is Trying to Remake His Least Favorite Court*, BUZZFEED NEWS (Mar. 16, 2018), <https://www.buzzfeednews.com/article/zoetillman/heres-who-the-white-house-pitched-for-the-federal-appeals>; McGahn Remarks, *supra* note 28, at 38:45-40:00. But see Robert Barnes & Ed O'Keefe, *Senate Republicans Likely to Change Custom That Allows Democrats to Block Judicial Choices*, WASH. POST (May 25, 2017), [https://www.washingtonpost.com/politics/courts\\_law/senate-republicans-consider-changing-custom-that-allows-democrats-to-block-judicial-choices/2017/05/25/d49ea61a-40b1-11e7-9869-bac8b446820a\\_story.html](https://www.washingtonpost.com/politics/courts_law/senate-republicans-consider-changing-custom-that-allows-democrats-to-block-judicial-choices/2017/05/25/d49ea61a-40b1-11e7-9869-bac8b446820a_story.html). "Blue slips" are blue pieces of paper that the Senate Judiciary Committee Chair sends to home-state senators, whose return of the slips indicates their willingness to commence the confirmation process for nominees to vacancies. Carl Tobias, *Senate Blue Slips and Senate Regular Order*, YALE L. & POL'Y REV. INTER ALIA 23-24 (2018).

commission (a commission that rigorously canvassed, interviewed, and suggested prospects for three decades). Senator Bob Casey (D-PA) similarly proposed several mainstream Third Circuit picks for White House assessment, who enjoyed negligible consideration, as Casey implied that Trump had already marshaled someone else to be the nominee.<sup>31</sup> A related illustration of machinations was expressed by John Kennedy (R-LA), who alleged in a hearing for a Louisiana Fifth Circuit nominee that McGahn had effectively instructed him on the identity of the nominee.<sup>32</sup>

Another critical departure from longstanding precedent was Trump's exclusion of the ABA from participating in judicial selection. Presidents who have held office since Eisenhower, with the exceptions of W. Bush and Trump, consistently deployed the ABA's examinations and rankings when tapping candidates. Obama deftly refrained from mustering a single possibility whom the ABA deemed not qualified.<sup>33</sup> However, Trump marshaled ten nominees with this rating while the Republican Senate majority confirmed eight of the nominees—three for appellate courts and five for district courts.<sup>34</sup> McGahn was

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31. For a more detailed discussion of White House Counsel relationships with senators from Wisconsin and Pennsylvania, see Tobias, *supra* note 5, at 207.

32. See S. Judiciary Comm., *Hearing on Nominees Before the S. Comm. on the Judiciary, 115th Congress*, at 46:50-47:50 (Nov. 29, 2017) [hereinafter Nov. 29, 2017 Hearing], <https://www.judiciary.senate.gov/meetings/11/29/2017/nominationshttps://www.judiciary.senate.gov/meetings/11/29/2017/nominations> (statement of Sen. John Kennedy, Member, S. Comm. on the Judiciary). For discussion of similar White House treatment of quite a few additional Democratic senators, see Carl Tobias, *Filling the California Federal District Court Vacancies*, 11 CALIF. L. REV. ONLINE 68, 73-74 (2020); Carl Tobias, *Filling the California Ninth Circuit Vacancies*, 92 S. CAL. L. REV. POSTSCRIPT 83, 92 (2019); Carl Tobias, *Filling the New York Federal District Court Vacancies*, 76 WASH. & LEE L. REV. ONLINE 1, 8 (2019); Kaplan, *supra* note 30.

33. See 163 CONG. REC. S8022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Patrick Leahy & Dianne Feinstein); see also 163 CONG. REC. S8,042 (daily ed. Dec. 14, 2017) (statement of Sen. Dick Durbin). To be sure, judicial selection has spiraled downward since 2000, and Bush may have accelerated this development; however, Republican denigration of the process substantially increased during the Obama Administration and culminated with the 2016 rejection of Merrick Garland. Nevertheless, former President Trump and Republican Majority Leader McConnell plumbed new depths in accelerating the appointments process' decline from 2017 until 2020.

34. *Ratings of Art. III Judicial Nominees: 115th, 116th, & 117th Cong.*, AM. BAR ASS'N STANDING COMM. ON JUDICIARY [hereinafter ABA Ratings]. Republican members vociferously disputed Eighth Circuit Judge Steven Grasz's not qualified rating because they contended that the American Bar Association is a liberal political group. *Hearing on Nominees Before the S. Comm. on the Judiciary, 115th Cong.* (Nov. 1, 2017) [hereinafter Nov. 1, 2017 Hearing], <https://www.judiciary.senate.gov/meetings/11/01/2017/nominations>; *Hearing on Nominees Before the S. Comm. on the Judiciary, 116th Cong.* (Oct. 30, 2019) [hereinafter Oct. 30, 2019 Hearing], <https://www.judiciary.senate.gov/meetings/10/30/2019/nominations> (documenting Sen. Mike

purportedly so upset with the ABA that he asked nominees to forgo cooperation with the ABA when conducting evaluations and ratings.<sup>35</sup>

Trump employed more conventional techniques when submitting district court nominees. For instance, he, like practically all other recent Presidents, derived copious recommendations from home-state officials and he premised many nominations on the candidates' abilities to expeditiously, inexpensively, and fairly resolve mounting dockets.<sup>36</sup> A number of selections were preeminent, earning extremely strong ABA rankings.<sup>37</sup> However, three trial-level suggestions withdrew and the ABA rated two more choices as not qualified because the designees failed to offer comprehensive information, or had administration review or hearing preparation that lacked care. Trump encouraged Kennedy and his Republican colleagues to oppose candidates whom they considered unqualified.<sup>38</sup> The appellate court emphasis also meant that seventy-six district court posts—twenty-six

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Lee's criticism of ABA participation in the selection process and urging ABA exclusion from selection). For other Republican senators' similar ideas, *see id.*, *Exec. Bus. Meeting Before the S. Comm. on the Judiciary*, 115th Cong. (Dec. 7, 2017) [hereinafter Dec. 7, 2017 Meeting], <https://www.judiciary.senate.gov/meetings/12/07/2017/executive-business-meeting-1>; 163 CONG. REC. S7,288, at 20 (daily ed. Nov. 16, 2017). For Senate confirmation of Judges Grasz, Holly Teeter, Charles Goodwin, Jonathan Kobes, Justin Walker, Lawrence VanDyke, Sarah Pitlyk, and Kathryn Kimball Mizelle, who received not qualified ratings, *see* ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Confirmations, 116th Congress (last updated Dec. 1, 2020); *see also infra* notes 50, 59, 103 and accompanying text.

35. *See* Adam Liptak, *White House Cuts A.B.A. Out of Judge Evaluations*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html>; *see also* Savage, *supra* note 26 (contending that the Trump Administration undermined the American Bar Association's independent guardrail role); Savage; *infra* note 99 and accompanying text (suggesting Biden's pre-nomination approach to ABA input was similar to Trump's).

36. *See* Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 19 (2017).

37. Eastern District of New York Judge Diane Gujarati and Northern District of Texas Judge Karen Gren Scholer are exceptionally well-qualified, mainstream examples. *See* ABA Ratings, *supra* note 34.

38. *See* Jennifer Bendery, *Trump Judicial Nominee Drops Out After Embarrassing Hearing*, HUFFINGTON POST (Dec. 18, 2017), [https://www.huffpost.com/entry/donald-trump-judicial-nominee-matthew-petersen\\_n\\_5a37ec14e4b0ff955ad51e82](https://www.huffpost.com/entry/donald-trump-judicial-nominee-matthew-petersen_n_5a37ec14e4b0ff955ad51e82); Rucker, Dawsey & Parker, *supra* note 25; *see generally* Press Release, White House, Off. of the Press Sec'y, President Donald Trump Announces Twenty-One Renominations (Jan. 5, 2018), <https://trumpwhitehouse.archives.gov/presidential-actions/president-donald-j-trump-announces-renomination-21-judicial-nominees/> [https://perma.cc/Y49B-NLFC]. *But see* Zoe Tillman, *Trump Had a Good Year Getting Judges Confirmed, But He's Still A Long Way From Reshaping The Courts*, BUZZFEED NEWS (Dec. 27, 2017), <https://www.buzzfeednews.com/article/zoetillman/trump-had-a-good-year-getting-judges-confirmed-but-hes> (documenting Leonard Leo's characterization of White House Counsel Donald McGahn's judicial nomination consultation as the most outstanding ever conducted).

constituting emergencies—currently remain unoccupied (although, notably, district court jurists resolve immense caseloads).

The chief executive ignored or deemphasized numerous effective judicial selection avenues. One crucial problem with the Trump Administration's submissions was the failure to prioritize empty trial-level slots, many of which implicated emergencies, in the rush to appoint conservative prospects for all existing court of appeals openings.<sup>39</sup> This deemphasis meant that emergencies profoundly increased after the GOP captured the Senate majority.<sup>40</sup> Trump also picked substantially fewer nominees from states which Democrats represented, even though emergencies plagued many of those jurisdictions.<sup>41</sup> California and New York confronted vacancies for up to seventeen appellate court, sixteen appeals court, and sixteen district court posts. Most of these openings involved emergencies. However, Trump inexplicably neglected to send one candidate for twenty-four of the vacancies until April 2018 or fill any empty California appellate court or trial-level position before October 2018. His administration filled no California district court vacancy before September 2020 and ultimately confirmed relatively few jurists to the New York district court unoccupied seats.<sup>42</sup>

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39. U.S. Courts Administrative Office emergencies reflect substantial length or significant caseloads. ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Emergencies (last updated Oct. 16, 2022) (twenty-four emergencies; overall vacancies constitute ten percent); Savage, *supra* note 26; Wheeler, *supra* note 23.

40. Emergencies exponentially skyrocketed from twelve to as many as eighty-six during the 114th and 115th Congress when Republicans controlled a Senate majority. ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Emergencies for April 2019 (last updated Oct. 16, 2022).

41. ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Emergencies for January 2015 (last updated Oct. 16, 2022); Wheeler, *supra* note 23; see also Press Release, White House, Off. of the Press Sec'y, *President Donald Trump Nominates Ninth Wave of Judicial Nominees* (Dec. 20, 2017) (documenting Trump blue-state nominees).

42. Empirical data trenchantly demonstrate Republicans' "red" state priority. See, e.g., ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Vacancy List (last updated Jan. 1, 2021) (California & New York); Press Releases, White House, Off. of the Press Sec'y, *President Donald Trump Announces Thirteenth Wave of Judicial Nominees* (Apr. 26, 2018) (New York appellate court nominee); *President Donald Trump Announces Fourteenth Wave of Judicial Nominees* (May 10, 2018) (seven New York district court nominees); *President Donald Trump Announces Eighteenth Wave of Judicial Nominees* (Oct. 10, 2018) (two New York appellate court nominees, three California Ninth Circuit, and four district court nominees); *President Donald Trump Announces Intent to Nominate Judicial Nominees* (Jan. 30, 2019) (renaming Ninth Circuit California nominees but Patrick Bumatay to district court); *Nominations Sent to the Senate* (May 21, 2019); see also Wheeler, *supra* note 23 (documenting that Trump and the Republican Senate majority required 217 median



Another constructive route which Trump and both Republican Senate majorities neglected to effectuate was improving minority judicial representation, particularly in comparison to Democratic Presidents and chambers.<sup>43</sup> For example, Trump instituted nominal endeavors that would identify, recruit, assess, tender, and confirm ethnic minorities or LGBTQ candidates namely in terms of employing diverse appointments staff and imploring home-state senators to recommend minority candidates.<sup>44</sup> Among Trump's 231 Supreme Court, appeals court, and district court confirmed nominees, only Mary Rowland and Patrick Bumatay constitute LGBTQ suggestions. Amul Thapar, James Ho, John Nalbandian, Neomi Rao, Michael Park, Kenneth Lee, Bumatay, Gren Scholer, Jill Otake, Martha Pacold, Nicholas Ranjan, Anuraag Singhal, Gujarati, Barbara Lagoa, Fernando Rodriguez, Terry Moorer, David Morales, Rodolfo Ruiz, Raúl Arias-Marxuach, Rodney Smith, Rossie Alston, Milton Younge, Jason Pulliam, Ada Brown, Richard Myers, Stephanie Dawkins Davis, Bernard Jones, Robert Molloy, Silvia Carreño-Coll, Franklin Valderrama, Roderick Young, and Fernando Aenlle-Rocha are all persons of color nominated by Trump.<sup>45</sup> In approximately 260 nominees to the federal courts, only Rowland and Bumatay constitute LGBTQ people while thirty-eight nominees comprise individuals of color.<sup>46</sup>

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days to confirm nominees in two-GOP-senator states, but "412 days [in] two-Democratic-senator states").

43. See Stacy Hawkins, *Trump's Dangerous Judicial Legacy*, 67 UCLA L. REV. DISCOURSE 20, 30 (2019); see also Carl Tobias, *President Donald Trump's War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531, 556 (2019); see also Zoe Tillman, *Biden Is Vetting BIPOC Judicial Nominees*, BUZZFEED NEWS (Mar. 11, 2021), <https://www.buzzfeednews.com/article/zoetillman/biden-judge-nominees-diversity-historic>; see generally *infra* notes 159–62 and accompanying text.

44. LGBTQ means openly disclosed sexual orientation, which some candidates, nominees, and judges may have decided not to divulge. LGBTQ individuals are considered "minorities" throughout this piece. See *infra* notes 59, 95, 159, 162 and accompanying text.

45. Most of the confirmed nominees are listed in the order of confirmation. ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Current Judicial Vacancies (last updated Oct. 15, 2022) (confirming three Supreme Court justices, fifty-four appellate judges, and 174 district court jurists); Tobias, *supra* note 43, at 555–57.

46. Nominees whom the Senate failed to confirm include Shireen Matthews, Steve Kim, Iris Lan, and Saritha Komtiredy, who constitute Asian Americans, as well as Sandy Nunes Leal and Hector Gonzalez, who are Latinx. See Press Releases, White House Off. of the Press Sec'y, *President Donald Trump Announces Fourteenth Wave of Judicial Nominees* (May 10, 2018) (Gujarati); *Six Nominations Sent to the Senate* (June 12, 2019) (Molloy); *Eleven Nominations Sent to the Senate* (Feb. 12, 2020) (Valderrama); *Sept. 8 Nominations* (Sept. 8, 2020) (Gonzales); *Dec. 2, 2019 Nominations* (Dec. 2, 2019) (Lan); *Nov. 1, 2019 Nominations* (Nov. 1, 2019) (Kim); *Oct. 17, 2019 Nominations* (Oct. 17, 2019) (Matthews, Carreño-Coll, Aenlle-Rocha, Leal); *May 4, 2020 Nominations* (May 4, 2020) (Komatiredy); *May 21, 2020 Nominations*

In conclusion, the number of Trump’s confirmed nominees who are people of color and LGBTQ individuals is substantially fewer than Obama’s (121 BIPOC, ten LGBTQ) and dramatically smaller than Biden’s thus far (fifty-one BIPOC, four LGBTQ).

### B. Confirmation Process

The Republican Senate majority’s confirmation system resembled the unproductivity of the nomination process by omitting, amending, or eroding customs or by abolishing, changing, or diluting ideas, which have proved effective for practically all other contemporary administrations and Senates. Exemplary illustrations include selective alterations of (1) the century-old policy for blue slips and (2) panel hearings.

In fall of 2017, Senator Chuck Grassley—who over the 114th and 115th Congress was the Judiciary panel Chair—fashioned an exception to the blue slip policy for appellate court nominees by scheduling hearings on possibilities without slips presented by two home-state officers, particularly when the Chair considered senators’ opposition to be “political or ideological.”<sup>47</sup> This amended the blue slip concept that *both* parties had followed throughout all eight years in Obama’s presidency (the most recent, applicable precedent).<sup>48</sup>

That situation deteriorated when Grassley permitted a January 2018 hearing for Wisconsin Seventh Circuit nominee Michael Brennan. Trump proposed him even though White House Counsel had minimally consulted Baldwin, the nominee lacked the requisite votes of a bipartisan merit selection panel (which had successfully provided successful choices for thirty years), and Grassley articulated minimal substantiation for placing significant discretion in the Chair (himself) to conclude whether the executive branch had “adequately consulted” with senators from home states on the issue regarding the nominee.<sup>49</sup>

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(May 21, 2020) (Young); *see also* Press Releases, *supra* note 42; FED. JUD. CTR., *American Indian Judges on the Federal Courts* (2022) (documenting that Brown is also Native American).

47. 163 CONG. REC. S7,174 (daily ed. Nov. 13, 2017); 163 CONG. REC. S7,285 (daily ed. Nov. 16, 2017); *see also* *Hearing on Nominees Before the S. Comm. on the Judiciary*, 115th Congress (Nov. 29, 2017); S. COMM. ON THE JUDICIARY MAJORITY, 115TH CONGRESS, HISTORY AND CONTEXT OF THE BLUE SLIP COURTESY (Nov. 2, 2017); Carl Hulse, *Judge’s Death Gives Trump A Chance To Remake A Vexing Court*, N.Y. TIMES (Apr. 7, 2018).

48. Grassley honored appellate court “blue slips” when he served as Chair in President Obama’s last two years, as did Senator Patrick Leahy when he served as Chair in Obama’s first six years. *Exec. Bus. Meeting of the S. Comm. on the Judiciary*, 115th Congress (Feb. 15, 2018) (statements of Sens. Charles Grassley & Patrick Leahy).

49. *Id.*; *see also* Tobias, *supra* note 5, at 207; *infra* note 79 and accompanying text.

Grassley sustained the policy when he convened a May hearing for the Oregon Ninth Circuit prospect Ryan Bounds, despite the fact that McGahn nominally consulted the Senators and both Oregon Democratic lawmakers contended that the person withheld detrimental information from their bipartisan screening panel.<sup>50</sup>

Grassley expressly acknowledged that blue slips were meant to ensure that Presidents thoroughly consult home-state officials while protecting their prerogatives in the selection process and the interests of the electorate. The Iowa Senator respected slips for trial-court picks, as did Senator Lindsey Graham (R-SC), the Chair who replaced Grassley.<sup>51</sup> However, Republican politicians had invoked slips to exclude accomplished, centrist appellate court nominees during Obama's eight years of service for political or ideological reasons, the very criteria which Grassley explicitly characterized as illegitimate.<sup>52</sup>

The Republican Chairs directly modified other effective requirements and traditions that had previously governed confirmation hearings. Critical was conducting *fifteen* sessions at which two court of appeals and four district court nominees testified without the minority party's approval. This radically contrasted to the Democratic Chair who only held *three* analogous nominee committee hearings throughout the Obama Administration's eight years. Obama's nominee committee hearings occurred only in unusual circumstances with the GOP's permission.<sup>53</sup> Most striking was a hearing for two controversial Trump court of appeals candidates and four district-level nominees

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50. See Maxine Bernstein, *Oregon's U.S. Senators Say Federal Prosecutor Ryan Bounds Unsuitable for 9th Circuit Vacancy*, OREGONIAN (Feb. 12, 2018), [https://www.oregonlive.com/portland/2018/02/oregons\\_us\\_senators\\_say\\_federa.html](https://www.oregonlive.com/portland/2018/02/oregons_us_senators_say_federa.html); see *Hearing on Nominees Before the S. Comm. on the Judiciary*, 115th Congress (May 9, 2018), See *Exec. Bus. Meeting of the S. Comm. on the Judiciary*, 115th Congress (June 7, 2018) (panel approval); see also Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 WAKE FOREST L. REV. 883, 892–93, 898 (2018) (analyzing more senator-White House Counsel disputes involving appellate court vacancies).

51. See *supra* note 47 and accompanying text. Graham, who served as Judiciary Committee Chair from January 2019 until January 2021, retained the “blue slip” policy for appellate courts that Grassley created in 2017 and the policy for district courts that all previous Chairs had followed. *Exec. Bus. Meeting of the S. Comm. on the Judiciary*, 116th Congress (Feb. 7, 2019) [hereinafter Feb. 7, 2019 Meeting]; see also Tobias, *supra* note 5, at 213 & n.54.

52. See *supra* note 42 and accompanying text; see also Tobias, *supra* note 22 (numerous Republican senators proffered no reason to retain “blue slips”).

53. 163 CONG. REC. S8022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Patrick Leahy & Dianne Feinstein). For example, on the same day, President Obama nominated Fourth Circuit Judges Albert Diaz and James Wynn who were paired in the confirmation process. Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2174–76 (2011); Tobias, *supra* note 5, at 214 (documenting that Senator Grassley convened ten hearings throughout 2017 and 2018, while Senator Graham

where the ABA representative explained the reasons for their controversial, not qualified rating that the ABA gave to a Trump appeals court nominee.<sup>54</sup> The panel session's packed nature granted senators extremely limited time for questioning the district court prospects.<sup>55</sup>

Many of the hearings seemed rushed and lacked the appropriate care for evaluating nominees to positions who promise to serve for the remainder of their lifetimes.<sup>56</sup> With many nominees, the panel allotted each senator only five minutes to pose queries. Some nominees simply delayed by repeating inquiries, while others deflected or evasively responded to members' questions.<sup>57</sup> The nominees were similarly reluctant to discuss whether the nominees, if confirmed, would recuse from suits which addressed matters that nominees directly litigated or about which they might possess clearly-articulated views.<sup>58</sup> This reluctance was particularly an issue for the significant numbers of Trump designees with problematic anti-LGBTQ records.<sup>59</sup>

Ahead of ballots for most court of appeals and trial court nominees, Judiciary Committee deliberations lacked adequate context and substantive content. Senators negligibly probed issues even though

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conducted five hearings throughout 2019 and 2020 in which two appellate court nominees appeared and four or five district court nominees testified).

54. *Hearing on Nominees before the S. Comm. on the Judiciary*, 115th Congress (Nov. 15, 2017) [hereinafter Nov. 15 Hearing]; *Hearing on Nominees before the S. Comm. on the Judiciary*, 115th Congress (Sept. 6, 2017) (conducting a similarly packed hearing); *Hearing on Nominees before the S. Comm. on the Judiciary*, 115th Congress (Aug. 1, 2018) (convening a hearing for one New York Second Circuit, and six New York district court, nominees when D.C. Circuit Judge Kavanaugh's Supreme Court nomination was pending).

55. The nominees merely possessed sufficient time to introduce themselves. Nov. 15 Hearing, *supra* note 54; *see also* 163 CONG. REC. S8023-24 (daily ed. Dec. 14, 2017) (statement of Sen. Dianne Feinstein) (contending that the panel convened five appellate court hearings over November, a month that included a one-week recess).

56. For lack of care, *see* 163 CONG. REC. S8022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Patrick Leahy & Dianne Feinstein).

57. Illustrative of these phenomena was testimony from numerous Texas district court nominees. *E.g.*, *Hearing on Nominees Before the S. Comm. on the Judiciary*, 115th Congress (Jan. 18, 2018); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 115th Congress (June 6, 2018); *see also* 163 CONG. REC. S8022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Patrick Leahy & Dianne Feinstein). *But see* 163 CONG. REC. S8025 (daily ed. Dec. 14, 2017) (statement of Sen. Cornyn).

58. *Hearing on Nominees Before the S. Comm. on the Judiciary*, 116th Congress (Feb. 5, 2019) (Neomi Rao); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 116th Congress (Sept. 25, 2019) (Pitlyk); *see also* 28 U.S.C. § 455 (documenting the recusal statute).

59. *See* LAMBDA LEGAL, COURTS, CONFIRMATIONS AND CONSEQUENCES (2021); *see also* Kristine Phillips, *Trump's Judicial Appointees Will Impact LGBTQ Rights Far Beyond Presidency*, USA TODAY (Jan. 5, 2021), <https://www.usatoday.com/story/news/politics/2021/01/05/trump-judges-impact-lgbtq-rights-years-lambda-legal-says/4099483001/>; *see generally infra* notes 159–62 and accompanying text.

these issues implicated life-tenured jurists. One deviation from regular order was Chair Grassley's decision against waiting on completed ABA examinations and ratings *before* the committee discussed nominees' qualifications and conducted ballots, despite innumerable requests from Senator Dianne Feinstein (D-CA), the Ranking Member, to have the evaluations and rankings once the ABA concluded the examinations and ratings. Grassley vociferously stated that he would not allow this external "political group" to dictate Judiciary Committee scheduling.<sup>60</sup> Therefore, it was entirely predictable that the more controversial submissions frequently captured panel approval with party-line votes.<sup>61</sup>

After the committee reported nominees, similar but less negative concerns troubled considerable review: Democrats asked for cloture and roll call ballots on virtually all nominees—even highly-competent, moderate individuals who deftly secured appointment. Republicans possessed a narrow chamber majority, so they could appoint nominees on party-line votes and Democrats' release of the 2013 nuclear option meant that judges could be directly approved with fifty rather than sixty votes.<sup>62</sup> It was egregious for the GOP to press four courts of appeals nominees' debates and chamber ballots into less than a 2017 work week after minimal previous notice while forcing six more appellate court nominees into one cryptic 2018 week following *de minimis* notice.<sup>63</sup> The high number of nominees, with their massive

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60. Aug. 1, 2018 Hearing, *supra* note 54 (two district court nominees received no ABA ratings before testifying in their hearing and four nominees received ratings on the day that all testified in their hearing); Michael Macagnone, *DC Court Picks Face Senate Panel Ahead of ABA Report*, LAW360 (June 28, 2017), <https://www.law360.com/legalindustry/articles/939442/dc-court-picks-face-senate-panel-ahead-of-aba-report>; *see generally supra* note 34 and accompanying text. *But see* 163 CONG. REC. S8022-24 (daily ed. Dec. 14, 2017) (statements of Sens. Patrick Leahy & Dianne Feinstein) (touting American Bar Association input's value).

61. Dec. 7, 2017 Meeting, *supra* note 34; Feb. 15, 2018 Meeting, *supra* note 48 (two appellate court nominees' approvals); *see also* Carl Tobias, *Senator Chuck Grassley and Judicial Confirmations*, 104 IOWA L. REV. ONLINE 31 (2019) (assessing Grassley's committee leadership during his 2015-18 tenure as Chair).

62. Before the nuclear option's detonation, cloture proponents needed sixty votes to cut off debate and vote. 159 CONG. REC. S8,418 (daily ed. Nov. 21, 2013) (releasing the nuclear option); Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L. J. 121,122 (2015).

63. Feinstein contended that Republicans only provided notice as senators recessed for the work week. *Exec. Bus. Meeting of the S. Comm. on the Judiciary*, 115th Congress (Nov. 2, 2017) [hereinafter Nov. 2, 2017 Meeting]; U.S. SENATE DEMOCRATS, *Schedule for Oct. 31, 2017* (Oct. 30, 2017, 7:40 PM), <https://www.democrats.senate.gov/2017/10/30/schedule-for-tuesday-october-31-2017> [<https://perma.cc/QL6J-6S2U>]; U.S. SENATE DEMOCRATS, *Schedule for Oct. 26, 2017* (Oct. 25, 2017, 7:10 PM), <https://www.democrats.senate.gov/2017/10/25/schedule-for-thursday-october-26-2017> [<https://perma.cc/ME7J-UCBN>]; U.S. SENATE DEMOCRATS, *Schedule for*

records, and the excessively delinquent notice, left the minority party inadequate time and resources to prepare.<sup>64</sup> Of greater relevance today is compressing *district* court nominee votes at chamber recesses. For example, over both mid-December and late-July of 2019, thirteen Trump nominees captured appointment, but the Senate in the 117th Congress has yet to confirm a *single* package of more than a comparatively small number of nominees across Biden's tenure.<sup>65</sup> The effects of these initiatives were relatively comparable to approving court of appeals judges.<sup>66</sup>

The impact of the debates that preceded the final ballots resembled the effects on committee discussions of candidates. Some debates were even comparatively less instructive than the panel exchanges.<sup>67</sup> Senate Democrats required cloture votes for practically all candidates while much of the thirty hours for debate after cloture addressed issues unrelated to specific nominees. Even when politicians spoke about nominees, few members heard their remarks. The Republican majority apparently concluded that thirty hours dedicated to district court nominees was so ineffective (or more likely so effective for the Democratic minority) that the GOP reduced this number to two hours (a figure which Democrats currently retain).<sup>68</sup>

Similar to Trump, the Republican chamber majority prioritized approving appeals court over district court nominees, confirming red

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*May 8, 2018* (May 7, 2018, 6:24 PM), <https://www.democrats.senate.gov/2018/05/07/schedule-for-tuesday-may-8-2018> [<https://perma.cc/X99J-LK6Q>]; U.S. SENATE DEMOCRATS, *Schedule for Apr. 26, 2018* (Apr. 25, 2018, 7:31 PM), <https://www.democrats.senate.gov/2018/04/25/schedule-for-thursday-april-26-2018> [<https://perma.cc/2U7M-LAQ7>].

64. Feinstein articulated these propositions. November 2, 2017 Meeting, *supra* note 63; see Tobias, *supra* note 5, at 216 & n.66 (contrasting Trump appellate court appointees confirmed in one week with those confirmed by Presidents Bush and Obama).

65. See 165 CONG. REC. D1399 (daily digest ed. Dec. 18, 2019); 165 CONG. REC. D1409-10 (daily digest ed. Dec. 19, 2019); 165 CONG. REC. D932-33 (daily digest July 30, 2019); 165 CONG. REC. D939 (daily digest ed. July 31, 2019); see also *infra* note 199 and accompanying text. Once Trump had filled practically all the appellate court vacancies, his administration confirmed more district court packages at recesses later in his tenure.

66. See *supra* notes 63–64 and accompanying text. Stacking appellate court debates and confirmation ballots can slow district court confirmations.

67. See *supra* notes 60–61 and accompanying text.

68. See 165 CONG. REC. S2,220 (daily digest ed. Apr. 3, 2019); see also Burgess Everett & Marianne Levine, *McConnell Preps New Nuclear Option to Speed Trump Judges*, POLITICO (Mar. 5, 2019), <https://www.politico.com/story/2019/03/06/trump-mcconnell-judges-1205722>; 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>; see generally *infra* note 174 and accompanying text.

state nominees, appointing conservative white male prosecutors and partners working for substantial law firms, and filling non-emergency court openings (although certain of these parameters derived mainly from the nominating system).<sup>69</sup> Those preferences helped achieve a record for confirming appellate court jurists over Trump's initial year but left more than twenty district-court nominees pending confirmation and many lower court positions empty at 2017's close. Those phenomena meant that few nominees won approval in blue states, only a pair of ethnic minority nominees in fact won confirmation, and emergency vacancies dramatically soared.<sup>70</sup> These priorities clearly helped Trump attain the court of appeals appointments record again during his second year, which inflicted problems similar to the previous year on district court nominees at 2018's conclusion. Thus, there were few blue state or minority appointments and numerous remaining emergencies. The second-half term closely resembled the preceding one.<sup>71</sup>

### C. Explanations For Selection Difficulties

The reasons why complications permeated the district court nomination and confirmation regimes are difficult to identify with confidence, mostly because the former Republican President and both GOP chambers supplied little information on appointments.<sup>72</sup> However, their rationale can be drawn from the prior account. One reason for problems appointing and confirming trial court judges was that Trump prioritized placing conservatives in appellate court vacancies to the exclusion of multiple important factors like minority identity, district court, blue state, and emergency confirmations. He asked that the White House Counsel accord circuit openings immense weight and rely principally on Federalist Society knowledge.<sup>73</sup>

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69. See *supra* notes 22–29 and accompanying text.

70. See U.S. SENATE, Exec. Calendar, Dec. 23, 2017; see also *supra* notes 39–46 and accompanying text, *infra* notes 74, 84 and accompanying text.

71. See ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Confirmations (last updated Dec. 1, 2020).

72. Concerns related to the privacy of nominees may justify providing somewhat less information. Tobias, *supra* note 21, at 1103; see Press Release, White House, Off. of the Press Sec'y, *Keeping His Promise: President Trump's Transparent, Consistent, and Principled Process for Choosing a Supreme Court Nominee* (July 9, 2018), [https://trumpwhitehouse.archives.gov/briefings-statements/keeping-promise-president-trumps-transparent-consistent-principled-process-choosing-supreme-court-nominee/?utm\\_source=link](https://trumpwhitehouse.archives.gov/briefings-statements/keeping-promise-president-trumps-transparent-consistent-principled-process-choosing-supreme-court-nominee/?utm_source=link).

73. See *supra* notes 26–28 and accompanying text (documenting Trump's substantial reliance on the Federalist Society, even if judicial selection was not completely outsourced to the Society).

The Trump Administration deemphasized (1) trial-level empty posts (imposing more responsibility for the nominations on a plethora of home-state politicians), (2) blue state vacancies, (3) diverse confirmations, and (4) emergencies for copious tribunals across the country. This inattention was unwarranted for multiple reasons. Trial-level jurists constitute the bench “workhorses” and resolve a significant majority of cases. Senator party affiliation concomitantly ought not drive court judicial resource allocation. Moreover, many diverse jurists offer considerable important benefits to the judicial system.<sup>74</sup> Finally, the emergency classification applies in the most troubling circumstances. This appellate court focus reveals why certain district nominees lacked salient qualifications: the Justice Department and White House Counsel apparently employed insufficiently robust evaluations and devoted comparatively minuscule resources to their nominations, while the Department and the Counsel’s Office decidedly ignored most ABA examinations and ratings.<sup>75</sup>

Trump confronted the start-up costs in establishing a Republican Party federal government after the eight years that Democrats controlled the presidency. Trump had not previously served in the public sector or ran for elective office. Trump also campaigned on promises to “drain the swamp” and upset conventional politics, phenomena that his management style and chaotic administration infighting exacerbated.<sup>76</sup> Trump did not respect or appreciate the courts, separation of powers, or the nomination and confirmation processes; as he demonstrated, with Trump’s searing critiques of jurists who frustrated his political efforts, and his concerted efforts to appoint judges who could

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74. See *supra* notes 36, 39–42 and accompanying text, *infra* notes 88–91 and accompanying text; see also Wheeler, *supra* note 23.

75. For how the Trump Administration’s emphasis on confirming appellate court judges suggested to certain observers why some district court nominees might have appeared weak, see Bendery, *supra* note 38; see also ABA Ratings, *supra* note 34 (appellate court not qualified ratings). For apparent deficiencies in Justice Department and White House Counsel nominee vetting and preparation, see *supra* notes 33–35, 38, 60 and accompanying text.

76. PETER BAKER & SUSAN GLASSER, *THE DIVIDER* (2022); BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* (2020); JOHN BOLTON, *THE ROOM WHERE IT HAPPENED: A WHITE HOUSE MEMOIR* (2020). Numerous print, television, radio, and online outlets covered those phenomena daily. See, e.g., Peter Baker, *Trump’s Efforts to Remove the Disloyal Heightens Unease Across His Administration*, N.Y. TIMES (Feb. 22, 2020), <https://www.nytimes.com/2020/02/22/us/politics/trump-disloyalty-turnover.html>; Yasmeen Abutaleb, Ashley Parker & Josh Dawsey, *Inside Trump’s Frantic Attempts To Minimize the Coronavirus Crisis*, WASH. POST (Feb. 29, 2020), [https://www.washingtonpost.com/politics/inside-trumps-frantic-attempts-to-minimize-the-coronavirus-crisis/2020/02/29/7ebc882a-5b25-11ea-9b35-def5a027d470\\_story.html](https://www.washingtonpost.com/politics/inside-trumps-frantic-attempts-to-minimize-the-coronavirus-crisis/2020/02/29/7ebc882a-5b25-11ea-9b35-def5a027d470_story.html).



reliably uphold his administration's endeavors.<sup>77</sup> Trump's attacks became so divisive and virulent that Chief Justice of the United States John Roberts was apparently compelled to lavish praise on the jurists disparaged by Trump, saying that America does "not have Obama judges or Trump judges."<sup>78</sup> These complications were magnified by the necessity to expeditiously fill a persistent Supreme Court opening and 103 lower court vacancies upon Trump's inauguration, both of which Senator McConnell, the Republican Majority Leader, and the Republican Caucus facilitated, specifically by blocking Obama's judicial nominees.<sup>79</sup>

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77. Trump constructed border fences without sufficient resources that Congress had properly appropriated and his White House severely undermined federal administrative agency endeavors. Olivia Paschal, *Trump Speech Declaring a National Emergency*, THE ATLANTIC (Feb. 15, 2019), <https://www.theatlantic.com/politics/archive/2019/02/trumps-declaration-national-emergency-full-text/582928/>; see also Gillian Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); *In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. (June 5, 2017), <https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts> (collecting early examples). Comparatively recent examples include baseless stolen election claims that many federal judges, even Trump appointees, rejected and the January 6 storming of the Capitol. See Dmitriy Khavin, Haley Willis, Evan Hill, Natalie Reneau, Drew Jordan, Cora Engelbrecht, Christiaan Triebert, Stella Cooper, Malachy Browne & David Botti, *Day of Rage: How Trump Supporters Took the U.S. Capitol*, N.Y. TIMES (June 30, 2021), <https://www.nytimes.com/video/us/politics/10000007606996/capitol-riot-trump-supporters.html> [<https://perma.cc/CS4Q-MWPH>]; see generally Peter Baker, *Portrait of a Power Grab By a Would-Be Dictator*, N.Y. TIMES (June 10, 2022).

78. Chief Justice Roberts uncharacteristically seemed to chastise President Trump when he proclaimed: "We have dedicated judges doing their level best to do equal right to [litigants]. We should be thankful for [an] independent judiciary." Adam Liptak, *Roberts Defends Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> [<https://perma.cc/7K8B-W7JZ>]; see also Peter Baker, *Trump, in India, Demands 2 Liberal Justices Recuse Themselves From His Cases*, N.Y. TIMES (Feb. 26, 2020), <https://www.nytimes.com/2020/02/25/us/politics/trump-supreme-court.html> [<https://perma.cc/EZP7-ZZU2>]; see generally Aziz Huq, *The Ominous Debate Over 'Trump Judges'*, POLITICO (Sept. 9, 2022), <https://www.politico.com/news/magazine/2022/09/09/the-ominous-debate-over-trump-judges-00055808> [<https://perma.cc/6GGP-4NLJ>].

79. Charles Homans, *Mitch McConnell Got Everything He Wanted. But at What Cost?*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/magazine/mcconnell-senate-trump.html> [<https://perma.cc/75MQ-QCCM>]; Jane Mayer, *How Mitch McConnell Became Trump's Enabler in Chief*, NEW YORKER (Apr. 20, 2020), <https://www.newyorker.com/magazine/2020/04/20/how-mitch-mcconnell-became-trumps-enabler-in-chief>; see also MITCH MCCONNELL, THE LONG GAME (2015); *infra* notes 113-14 and accompanying text (providing additional examples of McConnell's partisanship). But see Jane Mayer, *Why McConnell Dumped Trump*, NEW YORKER (Jan. 23, 2021); Editorial, *Trump's 'Death Wish'*, WALL STREET J. (Oct. 2, 2022), <https://www.newyorker.com/magazine/2021/02/01/why-mcconnell-dumped-trump>.

The pressure on the judicial nomination process was exacerbated by the commitment to appoint as many as possible conservative, young, appellate court jurists in the shortest time frame. At the panel level, drastically changing the blue slip policy exemplifies those dilemmas. In Grassley's haste to rapidly approve substantial numbers of conservative jurists, he undercut a mechanism that previously operated well. Grassley adopted a court of appeals exception, which afforded the Chair of the Senate Judiciary Committee substantial discretion to ascertain in each case whether Trump had been adequately consulted, by applying comparatively vague criteria, especially in determining whether home-state senators' opposition was ideological or political.<sup>80</sup> Grassley did not provide persuasive reasons for exempting the appeals courts from the blue slip policy and not the district court nominees. Republican and Democratic senators, in particular Grassley, concur that appellate court positions are more critical than district court vacancies because the judges are fewer in number, the courts' rulings govern several jurisdictions, and the tribunals' opinions enunciate considerably broader policy.<sup>81</sup>

Less deleterious was the need to confirm numerous able, conservative appellate court jurists, which motivated Grassley and other Republicans to expedite Judiciary Committee hearings, discussions, and ballots.<sup>82</sup> Similar complications arose from Grassley's eschewal of ABA nominee input prior to committee votes, and McConnell's stacking of confirmations regarding the numerous appeals court and trial-level prospects.<sup>83</sup> However, these actions were probably less problematic than Grassley's blue slip invention and fast chamber examination, given that GOP lawmakers' failed to cast even one 2017 panel ballot against a sole appellate or district court pick and more than one negative confirmation vote.<sup>84</sup>

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80. See *supra* notes 47-52 and accompanying text.

81. Judiciary Committee Chairs Grassley and Graham honored district court "blue slips" and Chair Durbin has continued that practice, although Chair Durbin has admonished Republican committee members that he will reconsider that decision if Republicans obstruct Biden's nominees. See *supra* note 24-29, 51-52 and accompanying text; Feb. 15, 2018 Meeting, *supra* note 48. For how the Senate assigns appellate court judgeships to jurisdictions that comprise the regional appellate courts, see Tobias, *supra* note 52, at 2171-74; *infra* note 188 and accompanying text.

82. See *supra* notes 53-61 and accompanying text. Republican committee hearings, deliberations regarding nominee qualifications, and votes were deficient. They merit improvement which Democrats have seemingly implemented.

83. See *supra* notes 60, 63-66 and accompanying text. The panel needed more ABA evaluations and ratings before votes and the Senate needed less stacking of confirmation debates and ballots.

84. Republican and Democratic party lock step voting suggests that improved procedures may not enhance federal judicial selection or eliminate the judicial vacancy

## III.

THE IMPLICATIONS OF TRUMP'S APPOINTMENTS AND  
BIDEN'S RESPONSES

A descriptive review of the appointments processes shows that the concepts that Trump and both of the Republican chamber majorities adopted had detrimental ramifications. Two appeals court openings and forty-four district court vacancies remained on January 20, 2021. Three quarters of the latter category involved emergencies. Most vacant seats were in blue states, and a striking paucity of confirmees and nominees constituted diverse individuals.<sup>85</sup> Until October 2019, the second and third parameters surpassed the eighty-plus trial court openings, thirty-two of which implicated emergencies, upon Trump's inauguration, even while active judges' inclination to depart this status was receding.<sup>86</sup>

Significant vacancy levels greatly increase pressure on district court judges, litigation parties, court personnel, and lawyers to swiftly, economically, and fairly resolve cases.<sup>87</sup> District judges constitute the justice regime's workhorses by deciding abundant civil lawsuits and criminal filings which receive precedence under the Speedy Trial Act. Myriad protracted vacancies deprive litigants and the electorate of substantial court judicial resources that they both acutely need.<sup>88</sup>

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crisis. *See* Dec. 7, 2017 Meeting, *supra* note 34; Feb. 15, 2018 Meeting, *supra* note 48 (documenting no negative Republican member's panel vote); 163 CONG. REC. S7,351 (daily ed. Nov. 28, 2017) (documenting one negative Republican member's confirmation vote).

85. *See supra* notes 39-46 and accompanying text. *But see infra* notes 95-130 and accompanying text.

86. District court emergencies are similar; total openings remained worse until October 2019. *See* Russell Wheeler, *Trump's 1st State of the Union: Is he really reshaping the federal judiciary?*, BROOKINGS INSTITUTION (Jan. 25, 2018), <https://www.brookings.edu/blog/fixgov/2018/01/25/trumps-1st-state-of-the-union-is-he-really-reshaping-the-federal-judiciary/>; Wheeler, *supra* note 23. *But see* Ariane de Vogue, *Get Ready for a Raft of Biden Court Nominees*, CNN (Mar. 11, 2021), <https://www.cnn.com/2021/03/11/politics/courts-biden-nominees/index.html>; *infra* note 166 and accompanying text.

87. FED. R. CIV. P. 1; *see* Patrick Johnston, *Problems in Raising Prayers to the Level of Rules: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325, 1325 (1995). District court jurists are the only judges whom most federal court litigants face.

88. Joe Palazzolo, *In Federal Courts, The Civil Cases Pile Up*, WALL STREET J. (Apr. 6, 2015), <https://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746> [<https://perma.cc/KCN4-A3F9>]; *see* John Emshwiller & Gary Fields, *As Criminal Laws Proliferate, More Are Ensnared*, WALL STREET J. (July 23, 2011), <https://www.wsj.com/articles/SB10001424052748703749504576172714184601654> [<https://perma.cc/RE2H-DPBW>]. The vacancy levels also impose pressure on Democratic political figures in the affected states.

The significant district court openings, twenty-six presently comprising emergencies, and rather small numbers of diverse Trump confirmed nominees, accentuate the necessity to select additional, diverse jurists, particularly in terms of ethnicity, gender, and sexual orientation. Former President Trump's neglect of minority representation imposed serious detrimental effects. The federal courts are one locus where persons of color, specifically Black, Latinx, indigenous people, and LGBTQ individuals are overrepresented vis-à-vis the criminal justice system, yet encounter distinctly constricted judicial representation, which the Biden Administration has pledged that it will remedy and has already substantially changed.

Persons of color, women, and LGBTQ jurists often possess constructive perspectives about questions related to the "culture wars" and other daunting issues that federal courts address.<sup>89</sup> The judges frequently help to curb ethnic, gender, and sexual orientation biases which currently erode justice in the federal courts.<sup>90</sup> Jurists who accurately reflect the United States population improve courts' public trust by showing that abundant people of color, women, and LGBTQ judges serve professionally while they can better appreciate situations that could prompt minority individuals to appear before federal courts.<sup>91</sup>

Excuses for not addressing this kind of diversity are unpersuasive. Numerous strong, mainstream persons of color, LGBTQ persons and women, including Trump confirmees Bumatay, Lagoa, and Smith, as well as myriad Biden nominees and appointees, refute the notion that choosing ethnic minority, female, and LGBTQ nominees undermines merit because the pool is clearly small or the nation lacks sufficient moderate prospects.<sup>92</sup> Significant numbers of ethnic minorities and numerous women whom Trump and the chamber confirmed show

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89. Theresa Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 610 (2003); Jennifer Peresie, Note, *Female Judges Matter: Gender and Decisionmaking in the Federal Appeals Courts*, 114 YALE L. J. 1759 (2005).

90. See, e.g., NINTH CIR. TASK FORCE ON RACIAL, RELIGIOUS AND ETHNIC FAIRNESS, FINAL REPORT 6–7 (1997); FED. CTS. STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990).

91. Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1442 (2008); Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 20, 2014), <https://www.newyorker.com/magazine/2014/10/27/obama-brief>.

92. See *supra* notes 37, 45–46 and accompanying text. Trump confirmed numerous other accomplished, conservative women, including Justice Barrett, Sixth Circuit Judge Joan Larsen, see ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Confirmations (last updated Dec. 1, 2020).

that plentiful superb individuals directly afford pertinent centrism *and* merit. The former President and the Republican Senate majorities needed only to capitalize on this readily accessible potential in order to further diversify the courts. Biden and the Senate Democratic majority have clearly done this.

The Trump White House's de minimis consultation when contemplating submissions for nominees with home-state politicians, transparency, and rigor; exclusion of ABA investigations and other effective tools; dependence on ineffective, restricted mechanisms; and tendency to emphasize swift confirmation of conservative appellate court jurists, taken together, impeded presidential discharge of constitutional responsibilities to nominate and confirm accomplished, mainstream judges, especially in district courts. Republican senators' intensive pressure to confirm conservative jurists—particularly through altering the blue slip policy, eliminating notable searching inquiries during committee hearings, and rubberstamping nominees—vitiating the Senate's constitutional role to provide meaningful advice and consent. A lack of judicial resources needed to deliver justice in district courts for protracted times imposed harmful effects on litigants, jurists, court staff, and counsel. Lack of judicial resources also can undercut public respect for the courts, the President, the Senate, and the rule of law.

Incessant emphasis on ideology while appointing judges can mean that numerous tribunals and court members truly resemble the elected branches. Intensely conservative jurists who capture approval with extremely politicized selection procedures may seem overly partisan and more likely to support determinations that lack ideological balance.<sup>93</sup> A homogenous judiciary can be less receptive to provocative views and spurn helpful and creative ideas. These notions may

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93. See *Exec. Bus. Meeting Before S. Comm. on the Judiciary*, 116th Cong. (May 7, 2019) [hereinafter *May 7, 2019*], <https://www.judiciary.senate.gov/meetings/03/07/2019/executive-business-meeting>; see also Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices As Advocates*, 94 NOTRE DAME L. REV. 1161, 1161 (2019); see generally Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1373–74 (2021); Allison Orr Larsen & Neal Devins, *Circuit Personalities*, 108 VA. L. REV. 1315 (2022). For concerns about how Trump appointees taking right-wing ideological positions and disregarding legal traditions can undermine public trust in judicial decision making, see Maura Dolan, *Rapid Changes Strain the Ninth Circuit; Trump's 10 picks have begun to shift court's longtime liberal bent and stirred criticism from veteran judges*, L.A. TIMES, Feb. 22, 2020, at A1; Josh Gerstein & Kyle Cheney, *Trump Judges Are on a Tear*, POLITICO (Sept. 12, 2022, 12:19 PM), <https://www.politico.com/news/2022/09/12/trump-judges-mar-a-lago-courts-000560> 71; Michael Hiltzik, *Trump's Judges Will Keep Moving U.S. to the Far Right for Decades*, L.A. TIMES, June 19, 2022, at A2.

lead jurists to ground decisions in political sources, personal secret preferences, or extraneous salient predilections, rather than the law and the facts in specific cases.

Eliminating and cabining pertinent rules and traditions, namely White House consultation of senators and blue slips, threaten the institutions of the presidency, the Senate, and make the courts appear in critical decline because the aforementioned requirements and customs are the “glue” which binds them.<sup>94</sup> Finally, these difficulties narrowly constrict public respect for, and confidence about, the three coordinate branches which epitomize U.S. democracy. This seriously undermines the federal government. Therefore, the next section of this article evaluates how President Biden and the 117th Senate have addressed the selection process, especially by attempting to counter the detrimental effects imposed by former President Trump and both Republican chamber majorities when appointing federal judges.

#### IV.

##### BIDEN ADMINISTRATION JUDICIAL SELECTION

President Biden, White House and Justice Department officials, the chamber Republican and Democratic Caucuses, panel leaders, and officers whose states face vacancies have enunciated powerful goals for the judicial nomination and confirmation processes during the Biden presidency. They include restoring diversity and regular order elements to appointment systems while filling prolonged openings with capable, moderate jurists. Senators appear to ensure that practices currently deployed are collegial, robust, effective, inclusive, and clear.

The Biden Administration and chamber members surveyed existing priorities, especially those which Trump and both Republican

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94. These phenomena are exacerbated by the January 6 storming of the Capitol; the Supreme Court decision in *Dobbs v. Jackson Women’s Health Org.*, which overturned *Roe v. Wade*, and the fact that someone who is a Supreme Court employee might actually have leaked the *Dobbs* draft opinion; as well as ongoing threats to democracy in the form of voting restrictions, allegations of voter fraud, and threats of violence against elected public officials. Stephanie Lai, Luke Broadwater & Carl Hulse, *Lawmakers Confront a Rise in Threats and Intimidation, and Fear Worse*, N.Y. TIMES (Oct. 1, 2022), <https://www.nytimes.com/2022/10/01/us/politics/violent-threats-lawmakers.html>; Adam Liptak, *Critical Moment for Roe, and the Supreme Court’s Legitimacy*, N.Y. TIMES (Dec. 5, 2021), <https://www.nytimes.com/2021/12/04/us/politics/mississippi-supreme-court-abortion-roe-v-wade.html>; see STABENOW, SCHUMER & WHITEHOUSE., *supra* note 27; Emily Bazelon, *The Originalists*, N.Y. TIMES, Mar. 1, 2020, at SM 26; Adam Liptak, *A Leaky Supreme Court Starts to Resemble the Other Branches*, N.Y. TIMES (May 12, 2022), <https://www.nytimes.com/2022/05/11/us/supreme-court-leak-roe-wade.html>; see also *supra* note 77 and accompanying text.

chamber majorities deployed, and identified those deserving change and how to carefully effectuate this change. For instance, Trump and the Senate preferred filling appellate court, red state, and non-emergency, vacancies but ignored or downplayed resource discrepancies related partially to the coronavirus. Thus, Biden and senators prioritize rectifying or confining district, blue state, and emergency court openings and judicial resource disparities. They focus on (1) district unfilled posts, because appeals courts initially addressed comparatively few openings but encountered considerably more after numerous jurists left active service or retired following Biden's presidential election success, and (2) blue states with immense district court vacancies, which often comprise emergencies. Resource differences ascribed to the coronavirus merit preference because the pandemic has ravaged the tribunals and the Judicial Conference requests that lawmakers actually create seventy-seven new trial-level, and two court of appeals, positions to address certain disparities.

Biden transparently designated the individuals and entities charged with selecting judicial nominees. For instance, Presidents generally assign court of appeals duties to the White House Counsel and trial court responsibilities to home-state legislators and the Justice Department, which mainly prepares nominees for confirmation. Biden has followed this tradition yet cautiously adjusts for the comparatively small number of appellate court openings. He and the Senate majority delineate persons with important selection responsibilities and examine and implement several concepts that efficiently promote diversity, regular order, and transparency.

During the 2020 presidential campaign Biden specifically pledged to comprehensively remedy Trump judicial appointments' disadvantages. On March 30, 2021, Biden revealed his intent to nominate the first package of submissions: eleven preeminent, mainstream candidates who distinctly reflect numerous diversity requisites.<sup>95</sup> The

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95. See *supra* note 1 and accompanying text. Biden has compiled and nominated twenty-six additional nominee slates that resemble the initial package of nominees whom the White House assembled. Press Releases, White House, Off. of the Press Secretary, *President Biden Announces Judicial Nominees: Second Slate* (Apr. 29, 2022); *Third Slate* (May 12, 2022); *Fourth Slate* (June 15, 2022); *Fifth Round* (June 30, 2022); *Sixth Round* (Aug. 5, 2022); *Seventh Round* (Sept. 8, 2022); *Eight Round* (Sept. 30, 2022); *Ninth Round* (Nov. 3, 2022); *Tenth Round* (Nov. 17, 2022); *Eleventh Round* (Dec. 15, 2022); *Twelfth Round* (Dec. 23, 2022); *Thirteenth Round* (Jan. 19, 2022); *Fourteenth Round* (Feb. 2, 2022); *Nominations Sent to Senate* (Feb. 22, 2022); *Sixteenth Round* (Apr. 13, 2022); *Seventeenth Round* (Apr. 27, 2022); *Eighteenth Round* (May 25, 2022); *Nineteenth Round* (June 15, 2022); *Twentieth Round* (June 29, 2022); *Twenty-First Round* (July 12, 2022); *Twenty-Second Round* (July 13, 2022); *Twenty-Third Round* (July 14, 2022); *Twenty-Fourth Round* (July 29, 2022);

suggestions included the first Muslim jurist and three Black women for appellate court openings. This acutely contrasts with Trump's record that failed to marshal *any* Black court of appeals nominee and merely *one* Latina. Two Biden nominees effectively defended people accused of crimes.<sup>96</sup>

In late March, Biden decided to announce that his White House would formally suggest the nominees, even though the process resulting in the nominations had begun considerably earlier.<sup>97</sup> Across 2020, Biden masterfully orchestrated the creation of a judicial selection team, which permitted his administration to carefully survey prospects ahead of the January inauguration. By summer 2020, the team had crafted effective appointments practices, which identified substantial numbers of exceptionally competent picks. After Biden had secured election, the formal transition process started. Most pertinently, Dana Remus, the White House Counsel Designate, deftly wrote senators a December 2020 letter which requested that politicians in states with vacancies tender powerful submissions for nominees who manifest the diversity perquisites before January 20, 2021.<sup>98</sup> Biden also somewhat

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*Twenty-Fifth Round* (Aug. 9, 2022); *Twenty-Sixth Round* (Sept. 2, 2022); *Twenty-Seventh Round* (Oct. 14, 2022); see also *supra* notes 89-92 and accompanying text (recounting numerous benefits that diversity provides).

96. For Trump's neglect of Black candidates, especially regarding appellate court nominees, see *Hearing on Pending Nominees Before S. Comm. On the Judiciary*, 116th Cong. (Apr. 28, 2021) [hereinafter Apr. 28, 2021 Hearing] (statement of Sen. Durbin); see also Adrian Blanco, *Biden, Who Pledged to Diversify the Supreme Court, Has Already Made Progress on Lower Courts*, WASH. POST (Jan. 27, 2022, 5:00 PM), <https://www.washingtonpost.com/politics/2022/01/27/federal-judge-diversity-biden/> ("Biden nominated as many minority women to be federal judges in four months as Trump had confirmed in four years, and he now has placed twice as many minority women on the federal bench as his predecessor."); *infra* note 161 and accompanying text.

97. See generally Ann E. Marimow & Matt Viser, *Biden Moves Quickly to Make His Mark on Federal Courts After Trump's Record Judicial Appointments*, 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://www.washingtonpost.com/local/legal-issues/biden-judge-nominations/2021/02/02/e9932f3a-6189-11eb-9430-e7c77b5b0297_story.html); see also Zoe Tillman, *Trump Transformed the Federal 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>; Jon Gramlich, *Biden Has Appointed More Federal Judges Than Any President Since JFK at This Point in His Tenure*, PEW RSCH. CTR. (Aug. 9, 2022), <https://www.pewresearch.org/fact-tank/2022/08/09/biden-has-appointed-more-federal-judges-than-any-president-since-jfk-at-this-point-in-his-tenure/>; *supra* notes 1, 21 and accompanying text.

98. Remus accorded senators forty-five days to suggest picks for new vacancies that materialized after the White House Counsel Designate had circulated the letter. Letter from Dana Remus, White House Counsel-Designate, to U.S. Sens. (Dec. 22, 2020) (on file with Author); Jennifer Bendery, *Biden's Team Tells Senate Democrats to Send Him Judicial Nominees ASAP*, HUFFINGTON POST (Dec. 30, 2020, 2:47 PM),



reduced dependence on ABA investigations and ratings in making nominations, mainly because his White House seemed to perceive that the professional, expert, and important evaluations and rankings delay nominations and confirmations.<sup>99</sup>

In mid-April of 2021, Biden officially nominated the seven remarkable prospects whom the chamber appointed that June.<sup>100</sup> They included two stellar mainstream Black women: United States District Court for the District of Columbia Judge Ketanji Brown Jackson as a D.C. Circuit nominee, and prominent, rigorous federal court advocate Candace Jackson-Akiwumi for the Seventh Circuit.<sup>101</sup> The proffered nominees also included three excellent, mainstream trial level nominees. Zahid Quraishi, who is the first Muslim district court jurist, was a long-time New Jersey lawyer and received smooth elevation from a magistrate judgeship in the district.<sup>102</sup> Regina Rodriguez, who liti-

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[https://www.huffpost.com/entry/joe-biden-courts-progressive-nominees\\_n\\_5fecc527c5b6e7974fd18321](https://www.huffpost.com/entry/joe-biden-courts-progressive-nominees_n_5fecc527c5b6e7974fd18321); Carrie Johnson, *White House Counsel Stays Behind the Scenes While Guiding Supreme Court Nomination*, NPR (Feb. 18, 2022, 5:11 AM), <https://www.houstonpublicmedia.org/npr/2022/02/18/1080820931/white-house-counsel-stays-behind-the-scenes-while-guiding-supreme-court-nomination/> (discussing Remus and her results); 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/2022/06/15/us/politics/biden-keisha-lance-bottoms.html>; see also *infra* note 162 and accompanying text.

99. See Marimow & Viser, *supra* note 97; Charlie Savage, *Biden Won't Restore Bar Association's Role in Vetting Judges*, N.Y. TIMES (Feb. 6, 2021), <https://www.nytimes.com/2021/02/05/us/politics/biden-american-bar-association-judges.html>; Carl Tobias, *Filling the Federal District Court Vacancies*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 421, 440 (2020); DeBonis, *infra* note 105 (documenting that the present committee usually awaits American Bar Association evaluations and ratings input); *supra* note 35 and accompanying text (Trump and American Bar Association relationship).

100. Press Release, White House, Off. of the Press Sec'y, *Nominations Sent to the Senate* (Apr. 19, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/19/nominations-sent-to-the-senate-11/> [<https://perma.cc/9PE6-6ALA>]. This piece deploys evaluation of the initial five nominees who received the first hearing as examples, but the subsequently tapped nominees possessed similar qualifications and received analogous confirmation processes.

101. *Id.*; see Press Releases, *supra* note 95; see also 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>; ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Confirmation Listing (last updated Nov. 6, 2022).

102. See *supra* notes 99-100 and accompanying text; see also Azi Paybarah, *Senate Confirms First Muslim Federal District Judge in 81-to-16 Vote*, N.Y. TIMES, June 12, 2021, at A15. But see Aymann Ismail, *A Biden Judge Would Be the First-Ever Muslim Judge on the Federal Bench. Some Muslims Are Furious*, SLATE (Apr. 27, 2021), <https://slate.com/news-and-politics/2021/04/zahid-quraishi-muslim-federal-judge-criticism.html> [<https://perma.cc/FC4K-P5VK>] (showing that some Muslims disapprove of Quraishi's nomination).

gated with national firms over many years and provided valuable prior public service as an Assistant U.S. Attorney easily captured approval for a judgeship in the District of Colorado.<sup>103</sup> Julien Neals, who had been a well-regarded municipal jurist in Newark and a Bergen County administrator, marshaled confirmation to the District of New Jersey.<sup>104</sup>

When assuming the chairmanship of the Senate Judiciary Committee, Senator Richard Durbin promised to lead the committee fairly and to cultivate robust and systematic bipartisan participation. However, Durbin advised Republican committee members that strategies and conventions like tactics and customs that the GOP had adopted would govern both parties. For example, he declared that the committee would apply the Republican circuit exception from the blue slip policy which Grassley had created as Chair.<sup>105</sup> The administration swiftly compiled the relevant paperwork and formally nominated ten distinguished suggestions in mid-April.<sup>106</sup> The panel speedily circulated questionnaires to the nominees who expeditiously mustered comprehensive and accurate replies.<sup>107</sup> The committee informed the

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103. Press Release, *supra* note 100; *see also supra* note 99 and accompanying text; Nicholas Fandos, *Senate Confirms 2 Judicial Nominees, Biden's First Picks to Rebalance the Courts*, N.Y. TIMES, June 9, 2021, at A12; *see also* Justin Wingerter, *U.S. Senate Confirms New Colorado Federal Judge After Five-Year Wait*, DENVER POST (June 8, 2021), <https://www.denverpost.com/2021/06/08/regina-rodriguez-judge-colorado-us-senate/> [<https://perma.cc/SKV3-6HN7>].

104. *See* Press Release, *supra* note 100; *supra* note 99 and accompanying text; Fandos, *supra* note 103.

105. Durbin admonished GOP committee members that Democrats would counter Republican obstruction of “district nominees with the arcane ‘blue slip’ process, [were the GOP] obstructing nominations without legitimate grounds.” Carl Hulse, *A GOP Warning: Don't Block Judges*, N.Y. TIMES, Mar. 2, 2021, at A17; *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/84HQ-NL9B>]; *supra* notes 47-50 and accompanying text. Durbin awaits ABA investigations and ratings, unlike Biden, Graham, and Grassley, before the committee deliberates on nominees’ qualifications and registers votes. *See supra* notes 60, 99.

106. Biden subsequently nominated and confirmed D.C. Superior Court Judge Florence Pan to the D.C. District Court vacancy created by Judge Jackson’s D.C. Circuit elevation and elevated Judge Pan to Jackson’s D.C. Circuit vacancy created by her Supreme Court elevation. Press Releases, *supra* note 95, 100; ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Confirmation Listing (last updated Nov. 6, 2022).

107. *E.g.*, S. COMM. ON THE JUDICIARY, 117TH CONG., CANDACE JACKSON-AKIWUMI QUESTIONNAIRE (COMM. PRINT 2021), <https://www.judiciary.senate.gov/imo/media/doc/Jackson-Akiwumi%20Senate%20Judiciary%20Questionnaire1.pdf> [<https://perma.cc/CV7J-R6LM>]; S. COMM. ON THE JUDICIARY, 117TH CONG., RESPONSES OF CANDACE JACKSON-AKIWUMI (COMM. PRINT 2021), <https://www.judiciary.senate.gov/>

public with notice of the April 28 hearing a week before conducting the session and of the nominees' identities two days later.<sup>108</sup>

The Chair opened the hearing by remarking that the session was “historic,” because each of the five appellate court and district court nominees was a person of color, who furnishes “demographic and professional diversity.”<sup>109</sup> The appellate court nominees provided thorough, cautious, and rigorous testimony. A few GOP members stressed the criminal defense experience compiled by two of the nominees, possibly to embarrass them. Senator Tom Cotton questioned Judge Jackson about representing a Guantanamo Bay prison “terrorist” detainee, but the jurist responded that the district court assigned her to the litigation.<sup>110</sup> Senator John Cornyn insistently probed how race and ethnicity may affect Jackson’s legal determinations, yet the nominee responded that she was completely independent and premised every case’s resolution on its discrete law and facts.<sup>111</sup> When GOP legislators sought the judge’s perspectives on enlarging the Supreme Court

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imo/media/doc/Jackson-Akiwumi%20Responses1.pdf [https://perma.cc/3YJQ-ERAS]; S. COMM. ON THE JUDICIARY, 117TH CONG., KETANJI BROWN JACKSON QUESTIONNAIRE (COMM. PRINT 2021), <https://www.judiciary.senate.gov/imo/media/doc/Jackson%20Senate%20Judiciary%20Questionnaire1.pdf> [https://perma.cc/6Q3B-8P49]; S. COMM. ON THE JUDICIARY, 117TH CONG., RESPONSES OF KETANJI BROWN JACKSON (COMM. PRINT 2021), <https://www.judiciary.senate.gov/imo/media/doc/Brown%20Jackson%20Responses1.pdf> [https://perma.cc/8HJE-ZW6T].

108. *Comm. on the Judiciary to Hold Hearing on First Slate of White House Judicial Nominations*, 117th Cong. (Apr. 23, 2021). The GOP panel majority the prior six years rarely posted names of nominees before the week in which Republicans conducted the hearings. *See* Tobias, *supra* note 5, at 211-17. The Democratic committee majority has occasionally posted nominee names the week of hearings. *See, e.g., Hearing on Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (June 8, 2022) (posting on June 6 for the June 8 hearing); *Hearing on Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (May 25, 2022) (posting on May 23 for the May 25 hearing).

109. Durbin lauded Biden’s efforts to promote diversity and criticized Trump’s lack of a Black appellate court nominee: “It is a sad reality that four years of [Trump and a GOP] Senate did not expand diversity on our federal courts.” Apr. 28, 2021 Hearing, *supra* note 96.

110. Judge Jackson elaborated that participation in criminal defense practice enhances her resolution of cases. *See supra* note 96 and accompanying text; *see also* Ann Marimow, *Ketani Brown Jackson Defends Her Independence in Senate Hearing*, WASH. POST (Apr. 28, 2021), [https://www.washingtonpost.com/politics/judge-ketani-brown-jackson-defends-independence-in-senate-hearing/2021/04/28/ea4015c8-a794-11eb-8d25-7b30e74923ea\\_story.html](https://www.washingtonpost.com/politics/judge-ketani-brown-jackson-defends-independence-in-senate-hearing/2021/04/28/ea4015c8-a794-11eb-8d25-7b30e74923ea_story.html) [https://perma.cc/GWS3-H9WW]; *see generally* Avalon Zoppo, *Are Judicial Picks with Defender Pasts Unfairly Criticized?*, NAT’L L. J. (July 16, 2021), <https://www.law.com/national-lawjournal/2021/07/16/are-judicial-picks-with-defender-pasts-unfairly-criticized-yes-and-its-not-new-experts-say/?srlreturn=20220919152926> [https://perma.cc/42T8-W9PN].

111. *See supra* notes 96, 106, 110 and accompanying text.

and specific Court opinions, she respectfully and properly declined to reply.<sup>112</sup>

Candace Jackson-Akiwumi addressed similar queries in a manner that was analogous to Judge Jackson's testimony.<sup>113</sup> For instance, Grassley, the current Ranking Member and former Chair, asked the nominee why she had defended a "criminal" prosecuted for weapons trafficking.<sup>114</sup> Jackson-Akiwumi reiterated that she was dutifully proffering the representation which the federal justice system grants defendants accused of crimes.<sup>115</sup> When probed as to ethnicity's impact on case resolution, she felicitously answered, "I don't believe that race will play a role in the type of judge I would be."<sup>116</sup> Further, she elaborated that various types of demographic diversity play useful roles by enhancing confidence about courts and citizen acceptance of court decisions' legitimacy.<sup>117</sup> Jackson-Akiwumi also remarked that improved diversity on the courts promotes role modeling for young students and counsel who aspire to be public servants.<sup>118</sup> When GOP senators directly solicited the nominee's perspectives on Supreme Court expansion and on its precedents, Jackson-Akiwumi respectfully demurred.<sup>119</sup>

The Chair accorded members one week to prepare questions for the record and accorded the nominees seven days to craft responses.<sup>120</sup> All five individuals quickly delivered thorough and perceptive replies.<sup>121</sup> During a later Executive Business Meeting, the committee

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112. *Id.*; see also PRESIDENTIAL COMM'N ON THE SUPREME COURT, FINAL REPORT (2021) (documenting the commission that President Biden created to study and make recommendations for improving Supreme Court operations, which considered the controversial issue of court packing).

113. See *supra* notes 110-12 and accompanying text.

114. Apr. 28, 2021 Hearing, *supra* note 96.

115. Jackson-Akiwumi trenchantly remarked: "I stand by [the] oath I took as an attorney, which is to represent zealously everyone who requires federal representation in our federal courts. That's how our system works best." Apr. 28, 2021 Hearing, *supra* note 96.

116. Apr. 28, 2021 Hearing, *supra* note 96; see also *supra* note 112 and accompanying text (documenting Judge Jackson's similar perspectives).

117. Apr. 28, 2021 Hearing, *supra* note 96; Sweet, *supra* note 96.

118. Apr. 28, 2021 Hearing, *supra* note 96; Sweet, *supra* note 96.

119. Apr. 28, 2021 Hearing, *supra* note 96; Savage, *supra* note 107. The nominee appropriately expressed no perspectives regarding legal issues that she may address as a judge.

120. Apr. 28, 2021 Hearing, *supra* note 96. QFRs treat in writing numerous issues that are not raised in hearings or that warrant elaboration.

121. See S. COMM. ON THE JUDICIARY, 117TH CONG., RESPONSE TO QUESTION FOR THE RECORD FROM SENATOR DICK DURBIN, CHAIR, SENATE JUDICIARY COMMITTEE TO JUDGE KETANJI BROWN JACKSON, NOMINEE TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT (Comm. Print 2021), <https://>

robustly deliberated issues relevant to effective judging and voted on the nominees.<sup>122</sup> Grassley contended that the GOP must hold appellate court “nominees to an exceptionally high standard of constitutionalism, regardless of how impressive their credentials are [,yet] unless a circuit nominee [exhibits assiduous commitment] to the Constitution as originally understood, I don’t think [the person] should be confirmed.”<sup>123</sup> Grassley also proclaimed that Judge Jackson refused to convincingly answer whether she believed in a “living Constitution,” although the jurist definitely rejected this construct across her trial-level confirmation process.<sup>124</sup> Chair Durbin disparaged the query as an inappropriate “litmus test.”<sup>125</sup> Moreover, Grassley voiced concern that

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[www.judiciary.senate.gov/imo/media/doc/Brown%20Jackson%20Responses1.pdf](https://www.judiciary.senate.gov/imo/media/doc/Brown%20Jackson%20Responses1.pdf) [<https://perma.cc/8HJE-ZW6T>]; S. COMM. ON THE JUDICIARY, 117TH CONG., SENATOR DICK DURBIN, CHAIR, SENATE JUDICIARY COMMITTEE, WRITTEN QUESTIONS FOR CANDACE JACKSON-AKIWUMI, NOMINEE TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT (Comm. Print, May 5 2021), <https://www.judiciary.senate.gov/imo/media/doc/Jackson-Akiwumi%20Responses1.pdf> [<https://perma.cc/7ZX5-VK86>]; S. COMM. ON THE JUDICIARY, 117TH CONG., SENATOR CHUCK GRASSLEY, RANKING MEMBER, QUESTIONS FOR THE RECORD, THE HON. JULIEN NEALS, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY (Comm. Print 2021), <https://www.judiciary.senate.gov/imo/media/doc/Neals%20Responses.pdf> [<https://perma.cc/NUL5-3WYX>]; SENATOR CHUCK GRASSLEY, RANKING MEMBER, QUESTIONS FOR THE RECORD, THE HON. ZAHID QURAIISHI, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY (Comm. Print 2021), <https://www.judiciary.senate.gov/imo/media/doc/Quraishi%20Responses.pdf> [<https://perma.cc/9Q5R-UHSS>]; SENATOR CHUCK GRASSLEY, RANKING MEMBER, QUESTIONS FOR THE RECORD, REGINA RODRIGUEZ, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLORADO (Comm. Print 2021), <https://www.judiciary.senate.gov/imo/media/doc/Rodriguez%20Responses.pdf> [<https://perma.cc/7ZS7-KU84>].

122. See *Exec. Bus. Meeting Before the S. Comm. on the Judiciary*, 117th Cong. (May 20, 2021) [hereinafter May 20, 2021 Meeting], <https://www.judiciary.senate.gov/meetings/05/13/2021/executive-business-meeting> [<https://perma.cc/559G-AL7R>]; see also Carl Hulse, *Senate Panel Advances First Biden Judicial Picks*, N.Y. TIMES, May 21, 2021, at A19.

123. See May 20 Meeting, *supra* note 122; see also Bazelon, *supra* note 94.

124. May 20 Meeting, *supra* note 122; S. COMM. ON THE JUDICIARY, 112TH CONG., RESPONSES OF KETANJI BROWN JACKSON NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA TO THE WRITTEN QUESTIONS OF SEN. TOM COBURN (Comm. Print 2012), <https://www.judiciary.senate.gov/imo/media/doc/121212QFR-Jackson.pdf> [<https://perma.cc/BMC6-CF83>].

125. See *Hearings on Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (June 9, 2021) [hereinafter June 9, 2021 Hearing], <https://www.judiciary.senate.gov/meetings/06/02/2021/nominations> [<https://perma.cc/PX4G-A7MY>]; *Hearings on Nominees Before the S. Comm. on the Judiciary*, 117th Cong. (Sept. 7, 2022) [hereinafter Sept. 7, 2022 Hearing], <https://www.judiciary.senate.gov/meetings/09/07/2022/nominations> [<https://perma.cc/WF3J-9K9K>]; see also *Exec. Bus. Meeting Before the S. Comm. on the Judiciary*, 117th Cong. (June 10, 2021) [hereinafter June 10, 2021 Meeting], <https://www.judiciary.senate.gov/meetings/06/03/2021/executive-business-meeting> [<https://perma.cc/K2AV-YN5B>]. Grassley appeared to somewhat gratuitously

designee Jackson-Akiwumi did not possess thoroughgoing “commitment to applying Seventh Circuit and Supreme Court precedents on the Second Amendment, [about her present conceptualization of] *Roe v. Wade*, [and certain] other aspects of her time as a federal defender;” yet, the nominee repeatedly attempted to assure lawmakers that she would dutifully follow all relevant precedent.<sup>126</sup>

Because the candidates are exceptional selections, who fully responded to many complex questions, they deserved superior committee ballots. However, merely a *pair* of Republican senators favored Jackson and *one* supported Jackson-Akiwumi (even though considerably larger numbers of panel members advanced in committee district selections Neals, Quraishi, and Rodriguez).<sup>127</sup> Thereafter, Durbin rapidly marshaled the nominees onto the floor. Majority Leader Chuck Schumer attempted to convene final debates and votes on every nominee, but the GOP rejected unanimous consent for any prospect. Thus, Schumer invoked cloture, which halts discussions and enables ballots to be cast, and a majority concurred.<sup>128</sup> Accordingly, the leader then scheduled rigorous nominee confirmation debates and votes.<sup>129</sup>

The processes for subsequent confirmations have closely mirrored those of the initial five nominees who received confirmation. In Biden’s first and subsequent packages of nominees, most of the nomi-

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respond that “any originalist would admit that you take into consideration all of the constitutional amendments.” *Id.*; see also Madison Alder, *Durbin Pushes Back on Originalism as Test for Judges*, BLOOMBERG (June 6, 2021), <https://news.bloomberglaw.com/us-law-week/durbin-pushes-back-on-originalism-as-gop-test-for-judicial-picks> [<https://perma.cc/A4TE-WV5J>]; see generally Brad Kutner, *Debate Over Originalism Swamps Judiciary Hearing*, LAW.COM (Sept. 7, 2022), <https://www.law.com/nationallawjournal/2022/09/07/debate-over-originalism-swamps-senate-judiciary-hearing/> [<https://perma.cc/G2HL-NK8L>].

126. May 20 Meeting, *supra* note 122. Grassley remarked that the “district nominees seem well qualified,” voting for them. See Hulse, *supra* note 122; see also Andrew Kragie, *Senators Advance Judge Jackson, 4 More Biden Judicial Picks*, LAW360 (May 20, 2021), <https://www.law360.com/pulse/articles/1386324/sens-advance-judge-jackson-4-more-biden-judicial-picks> [<https://perma.cc/V24D-T8FT>].

127. The votes cast were 13-9 (Jackson), 12-10 (Jackson-Akiwumi), 15-6 (Neals), 17-5 (Rodriguez), and 19-3 (Quraishi). May 20 Meeting, *supra* note 122; Kragie, *supra* note 126, see also *infra* notes 128-29 and accompanying text (similar as to confirmation vote support).

128. 167 CONG. REC. S3943-44, S3953 (daily ed. June 7, 2021) (Neals); 167 CONG. REC. S3967-72 (daily ed. June 8, 2021) (Rodriguez); 167 CONG. REC. S4024-26 (daily ed. June 10, 2021) (Quraishi); 167 CONG. REC. S4027 (daily ed. June 10, 2021) (Jackson); 167 CONG. REC. S4710-11, S4723 (daily ed. June 23, 2021) (Jackson-Akiwumi); see S. RULE XXII (rev’d Jan. 24, 2013).

129. 167 CONG. REC. S3969-71 (Neals); S3975 (Rodriguez); S4027-29, S4032 (Quraishi); S4504-07, S4511 (Jackson); S4735, S4748 (Jackson-Akiwumi). See generally Fandos, *supra* note 103; see also Hulse, *supra* note 101.

nees enjoyed similarly smooth committee hearings and deliberations, positive ballots, and relevant chamber debates and votes.<sup>130</sup>

In sum, Biden attained enormous success in countering the deleterious implications of the Trump Administration's extraordinary initiatives to pack the appellate courts with fifty-four extremely conservative, young jurists. Biden did this by carefully nominating and confirming substantial numbers of highly-qualified, mainstream individuals who are exceptionally diverse in terms of ethnicity, gender, sexual orientation, ideology, and experience. Although Trump achieved partial lasting success when his administration created records for approving conservative court of appeals members, he jettisoned or deemphasized practices that had recently appointed excellent jurists. The courts now have seventy-six unoccupied district posts, twenty-six of which involve emergencies—statistics that are largely reflective of Trump's significant impact. Both resemble figures upon Trump's inauguration. Therefore, the last segment explores procedures that Biden and the Senate could duly adopt to increase preeminent, moderate appointees, fill remaining vacancies, increase diversity of the bench, and restore regular order to selection processes.

## V.

### SUGGESTIONS FOR THE FUTURE

The prior examination reveals that the processes which Trump and the GOP Senate instituted disrupted substantial numbers of reliable diversity and regular order features that are critical to the nomination and confirmation processes. In order to rectify these complications, Biden and each party's senators ought to keep dutifully reinstating the diversity parameters and the regular order constructs. Numerous practices instituted by Trump lacked efficacy and require removal or revision while others that his administration ignored warrant careful revitalization. However, a few constructs which Trump applied performed comparatively well and should continue to be employed. Accordingly, the concluding portion offers suggestions that will place exemplary judges in the remaining vacancies and continue to counteract Trump's significant negative impact on the courts.

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130. For all the candidates whom Biden has nominated and confirmed, see ADMIN. OFF. OF THE U.S. CTS., *VACANCIES IN THE FED. JUDICIARY*, Judicial Confirmations (last updated Oct. 15, 2022); Press Releases, *supra* note 95.

### A. Planning

Part IV explains that participants in the selection process attempt to maximize collaboration. For instance, many of those involved have enunciated cohesive goals to improve the judicial nomination and confirmation processes, such as Biden, executive branch officers in the White House Counsel Office and the Department of Justice Office of Policy Development, the Democratic and Republican Caucus, panel leaders, and individual senators, particularly in states where vacancies arise. These goals include (1) the approval of talented, centrist, diverse jurists by aptly prioritizing lower-federal court, blue-state, and emergency openings; (2) rectifying crucial judicial resource disparities; and (3) cautiously reestablishing desirable regular order norms.<sup>131</sup> Biden and Democratic senators correspondingly delegated appointments responsibilities properly and championed dynamic transparency. Republicans and Democrats must keep pursuing these endeavors and improving the efforts as indicated.

### B. Short-Term Suggestions

In an effort to fill vacancies with highly-competent, mainstream jurists and reinvigorate diversity phenomena and regular order, Biden and the Senate ought to deploy numerous strategies that past Republican and Democratic Presidents adopted. First, elevate (1) fine Magistrate Judges, (2) capable moderate state court judges, and (3) revered and consensus district court jurists, to appellate courts. This action is practical now because the submissions have compiled immense, easily-located, jurisprudential records, and proffer significant expertise.<sup>132</sup> Effective employment of this approach is exemplified by one Illinois U.S. Magistrate Judge and three Illinois state court jurists whom Trump nominated and confirmed to federal district courts over 2020,<sup>133</sup> Magistrate Judges whom Biden rapidly approved for trial

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131. Congress should increase federal court budgets which address resource disparities that Covid-19 inflicted and authorize additional court of appeals and district court judgeships that the Judicial Conference recommended. *See infra* notes 169, 190-91 and accompanying text. The nine current and seven future appellate court openings may merit priority, as Trump packed those courts which make more policy because they cover multiple states and the Supreme Court hears so few cases.

132. 28 U.S.C. § 631. For a comprehensive assessment of elevating judges whom senators have already confirmed once, *see* Elisha Savchak, Thomas Hansford, Donald Songer, Kenneth Manning, & Robert Carp, *Taking It to the Next Level: The Elevation of District Court Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478 (2006); Tobias, *supra* note 50, at 910.

133. Carl Tobias, *Illinois Insights for How Biden Can Fill the District Court Bench*, 116 NW. U. L. REV. ONLINE OF NOTE (May 2022); *see supra* notes 34, 45 and accom-



court openings, and district court jurists whom Biden appointed to court of appeals vacancies.<sup>134</sup>

Biden has also pragmatically renamed a small number of the twenty accomplished, mainstream Obama district court nominees who earned panel approval yet lacked confirmation.<sup>135</sup> The solution permits swift appointment because many renamed nominees only need to win Judiciary Committee reports and Senate confirmation votes, obviating the time otherwise spent on panel hearings.<sup>136</sup> Trump renamed fifteen excellent Obama district court nominees who smoothly captured appointment. Renaming a few more Obama-proposed nominees can supplement diversity or fill protracted openings, which Biden has already begun to do.<sup>137</sup> Twenty-four additional Obama district court nominees without panel ballots could merit renaming.<sup>138</sup> A small number of Trump nominees might also warrant assessment. For example, impressive, moderate California and New York prospects who lacked confirmation might deserve reconsideration.<sup>139</sup> The Biden Administration should assiduously consult with politicians from those

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panying text; Tobias, *supra* note 5, at 224-25 (scrutinizing judges whom Trump elevated).

134. See, e.g., *supra* notes 100, 102, 127, 128 and accompanying text (Quraishi); *supra* notes 100, 130 and accompanying text (Boardman); *supra* notes 100-01, 110-12, 129 and accompanying text (Jackson); *supra* note 106 (Pan); 167 CONG. REC. S9115 (daily ed. Dec. 13, 2021) (Judge Lucy Koh's Ninth Circuit elevation).

135. The Senate did not confirm the Obama nominees in 2016, because the Republican majority denied them votes. Tobias, *supra* note 36, at 18-19; see *supra* note 22 and accompanying text.

136. Most nominees earned committee hearings and approval in 2016. For nominees who need another hearing, the previous committee, Federal Bureau of Investigation and American Bar Association reviews may require only minimal updating.

137. See Tobias, *supra* note 36, at 21-22; see also *supra* notes 100, 102, 129, 134 and accompanying text (confirming Neals, Koh, & Pan).

138. See Tobias, *supra* note 36, at 21-22 (documenting twenty-four additional Obama 2016 district court nominees, who lacked panel approval—including Rodriguez, whom Biden did renominate and confirm, and Diane Gujarati, whom Trump did renominate and confirm—whom Biden may currently renominate); see also *supra* notes 100, 102, 127-129 and accompanying text (renaming and confirming Rodriguez).

139. Hector Gonzalez, Jennifer Rearden, Iris Lan, & Shireen Matthews comprise instructive examples. See Andrew Kragie, *Trump Judicial Picks Left Behind*, LAW360 (Jan. 7, 2021), <https://www.law360.com/articles/1334070/the-26-trump-judicial-picks-getting-left-behind> [<https://perma.cc/7JV3-4WHY>]; see also Eleventh & Thirteenth Rounds, *supra* note 95 (documenting Biden renomination of New York district court nominees Gonzalez and Rearden); ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Confirmations (last updated Oct. 15, 2022) (confirming Gonzalez and Rearden). *But see* Press Releases, *supra* note 95 (documenting Biden renomination of no California district court nominee whom Trump nominated).

states and efficiently review the numerous previously-tapped nominees.<sup>140</sup>

Biden diligently instituted, reinstated, or enhanced many valued processes, which most previous Democratic and Republican White Houses implemented but Trump rejected or diluted. The current President should continue this restoration. One such convention is meticulously consulting politicians who represent home states with vacancies about potential nominees—a concept on which Biden relied when he served as Obama’s Vice President and that he coaxed leaders to activate when he served as a Judiciary Committee member and the panel’s Chair.<sup>141</sup> Assertively cultivating senators in bipartisan support of highly effective selection processes speeds nominations and confirmations. Illustrative nominees include eight professional, mainstream Northern and Southern District of Illinois Trump picks whom Illinois Senators Duckworth and Durbin favored, the panel quickly reported, and the chamber solicitously appointed.<sup>142</sup> Thus, Biden’s thorough consultation might instigate prompt nominations and confirmations, and may solve disagreements that frequently erode processes and interparty cooperation.<sup>143</sup>

Biden assiduously countered, and must continue addressing, Trump’s prioritized confirmation of fifty-four accomplished, conservative appellate court judges, and concomitant neglect of district court vacancies. Indeed, Biden closely surveyed, and ought to continue analyzing, plenty of constructs that he effectively deployed as a senator and Vice President that will rectify the numerous remaining district court vacancies. For instance, selection officials have properly emphasized, and must keep stressing, filling *all* the tribunal openings. One notion which may remain valuable is the prioritized nomination of candidates who could fill the district court emergen-

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140. Senators who know accomplished prospects merit some White House deference. Biden and those Senators, as with Obama choices, should use finely-calibrated analyses of vacancy number and length, candidate ability, and election timing. Tobias, *supra* note 5, at 234.

141. *See supra* notes 21, 30-32 and accompanying text. Encouraging thorough White House consultation of home-state senators could be the most important purpose of “blue slips.”

142. *See* Carl Tobias, *Filling the Illinois Federal District Court Vacancies*, 47 PEPP. L. REV. 1 (2019) (documenting the smooth appointment of Northern District Judges Rowland, Pacold, & Steven Seeger); Tobias, *supra* note 133 (same for later nominees). *But see supra* note 42 and accompanying text.

143. *See supra* notes 30-31, 50 and accompanying text (documenting Oregon and Wisconsin senators’ disputes with White House Counsel); Kaplan, *supra* note 30 (documenting analogous Ohio and Washington senators’ disputes with White House Counsel); *supra* note 32 and accompanying text (documenting similar California and New York senators’ disputes with White House Counsel).

cies.<sup>144</sup> Biden initially focused on, and may continue emphasizing, the immense open slots and courts with large percentages and judicial contingents, specifically across California and New York.<sup>145</sup> Continued concentration on these and other jurisdictions— including New Jersey and Washington— may continue alleviating the problematic blue-state nominee paucity.<sup>146</sup> Biden has started to eliminate or reduce this deficit by performing the type of systematic consultation that he routinely practiced when discharging vice presidential responsibilities: increasing home-state officers' duties to recruit, canvass, and proffer numerous talented designees whom Biden selects, the chamber smoothly examines, and then felicitously and expeditiously confirms.<sup>147</sup>

The President revised, and should consider amending more, Trump's determination to exclude the ABA from official responsibility to conduct investigations and develop cogent ratings.<sup>148</sup> For example, Biden does not wait on ABA material before tendering nominees<sup>149</sup> even though prior modern White Houses preemptively

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144. See *supra* notes 39-42, 72, 84-85 and accompanying text.

145. See Jacqueline Thomsen, *Bench Report: The Judge Who Won't Stop Fighting a Withdrawn Order to Take a Psych Exam. Plus, California Gets Its First Biden Judicial Picks*, LAW.COM (Sept. 10, 2021) (reporting on Biden nominee first picks for California's federal courts), <https://www.law.com/2021/09/10/bench-report-the-judge-who-wont-stop-fighting-a-withdrawn-order-to-take-a-psych-exam-plus-california-gets-its-first-biden-judicial-picks/> [<https://perma.cc/H7XA-URMX>]; see also *supra* notes 32, 39-42, 74, 84-85, 131, 139-40 and accompanying text (urging Biden to stress appellate court openings because Trump packed them with conservative judges.).

146. Washington experienced five, and New Jersey encountered six, district court emergency openings at the Trump Administration's conclusion, practically all of which Biden has filled. See ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Emergencies (last updated Oct. 16, 2022); see, e.g., Madison Alder, *Seattle Trial Court Turnover Gives Biden Rare Chance to Restock*, BLOOMBERG (Jan. 7, 2022), <https://news.bloomberglaw.com/us-law-week/seattle-trial-court-turnover-gives-biden-rare-chance-to-restock> [<https://perma.cc/9Q7S-PXVY>]; see, e.g., Tracey Tulley, *In New Jersey, Empty Benches Hinder Justice*, N.Y. TIMES, (Mar. 17, 2021), at A1; see also *supra* notes 42, 74, 84, 139 and accompanying text.

147. The Trump White House seemed to actively consult and defer to numerous home-state senators' recommendations regarding candidates who could fill district court vacancies. Early Biden nominees suggest that his White House has deferred, and will continue to assiduously consult and defer, to the senators. Tobias, *supra* note 133; see *supra* notes 1, 36-38, 142 and accompanying text; *infra* note 201 and accompanying text.

148. Savage, *supra* note 26; see *supra* note 38 and accompanying text.

149. Biden's principal concern regarding deployment of the ABA evaluations and ratings has seemingly been delayed nomination and confirmation. Practically all of his nominees have earned well qualified ABA rankings, none received not qualified ratings, and the ABA has investigated and rated most nominees *before* the panel conducted discussions and votes. ABA Ratings, *supra* note 34; see also Dahlia Lithwick,

access the ABA's capable assessors, comprehensive investigations, and constructive rankings.<sup>150</sup> Moreover, deploying ABA scrutiny and ratings during *pre-nomination* inquiries could remedy or ameliorate the embarrassment suffered by candidates whom the ABA deems "not qualified."<sup>151</sup> Trump's appointment of many picks with the "not qualified" ranking suggests that the ABA can alert participants in the selection process to potential concerns about nominees, even if they ultimately win confirmation.<sup>152</sup> Thus, *after* Biden more fully revives the diversity elements, he should contemplate reinstating broader ABA selection participation.<sup>153</sup>

Biden instituted efforts that improve diversity vis-à-vis ethnicity, gender, sexual orientation, ideology, and experience. Diversity of these qualities provides significant benefits. Minority judicial representation enhances the quality of judicial decision-making by affording divergent and instructive perspectives, cabining biases that can impair the delivery of justice in the federal courts, and expanding trust in courts. The public trust is higher in diverse courts because the tribunals and their jurists resemble more fully the entire country. Diverse judges may better understand why some litigants become involved with the federal civil and criminal justice systems.<sup>154</sup>

The Obama Administration selection team, in which Biden played a significant role, deftly broke records for enlarging diversity. A few examples include the confirmation of more Asian Americans

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*Biden Borrows the Federalist Society's Tactics. Good*, SLATE (Mar. 30, 2021), <https://slate.com/news-and-politics/2021/03/biden-judges-nominations-federalist-society-tactics.html> [<https://perma.cc/ZML2-K3BM>]; *supra* note 99, 105 and accompanying text.

150. *See supra* note 33 and accompanying text. *But see supra* notes 34, 149 and accompanying text.

151. *See supra* notes 148-49 and accompanying text (Biden, like Obama, and unlike Trump, has recommended no nominee who received a not qualified bar association rating).

152. Chief judges where two district nominees whom Trump appointed sit, whom the ABA rated not qualified, urged Senate appointment that the chamber granted. *Hearing on Judicial Nominees before the S. Comm. On the Judiciary*, 115th Cong. (Dec. 13, 2017); *Exec. Bus. Meeting to Consider Pending Nominations Before the S. Comm. On the Judiciary*, 115th Cong. (Jan. 18, 2018); *see also supra* note 34 and accompanying text.

153. Democrats' justifiable haste to reverse the adverse effects of Trump judicial selections' may support this delay, but the value of the ABA's input merits review and possibly restoration. Thus, this idea, like appellate court "blue slips," shows the tension between diversity and "regular order" that can be resolved best by first restoring diversity and then restoring "regular order." *See infra* note 172 and accompanying text.

154. *See supra* notes 89-92 and accompanying text.

than their predecessors combined;<sup>155</sup> strong percentages of Black confirmees<sup>156</sup> and women;<sup>157</sup> copious Latinx judges;<sup>158</sup> and sharply enhanced numbers of LGBTQ jurists.<sup>159</sup> Biden, then-Vice President, helped secure these records by participating in nominations and confirmations. He invoked (1) thirty years of Judiciary Committee experience, seven as the panel's Chair, when Biden discharged lead responsibility for processing multiple Supreme Court nominees and more than four hundred appellate court and district court nominees, and (2) cordial, durable relationships with numerous senators and other individuals who might substantially influence nominations and confirmations. As President, Biden appropriately kept his pledges to select a Black female Justice while also approving plentiful appeals court and district court judges who reflect the country; women make up practically four in five confirmed nominees, and nominees of color

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155. FED. JUD. CTR., *Asian American Judges on the Federal Courts* (2022). Trump dramatically confirmed significant numbers of Asian American appellate court and district court judges. Tobias, *supra* note 5, at 211 & n.48; *see supra* notes 45-46 and accompanying text.

156. FED. JUD. CTR., *African American Judges on the Federal Courts* (2022).

157. FED. JUD. CTR., *Women Judges on the Federal Courts* (2022) (documenting Obama/Biden appointment of practically double Trump's percentage of women).

158. FED. JUD. CTR., *Hispanic Judges on the Federal Courts* (2022); FED. JUD. CTR., *Afro-Latino Judges on the Federal Courts* (2022).

159. FED. JUD. CTR., *American Indian Judges on the Federal Courts* (2022) (documenting that Brown is also Native American). Obama and Trump appointed one Native American each and Biden has confirmed District of Maryland Judge Lydia Griggsby, Western District of Washington Judge Lauren King, and Central District of California Judge Sunshine Sykes. ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Confirmations (last updated Oct. 15, 2022). Biden has confirmed the following LGBTQ judges: Second Circuit Judges Beth Robinson and Alison Nathan, District of Colorado Judge Charlotte Sweeney, and Eastern District of New York Judge Nina Morrison. *Id.*; *see also* Jennifer Bendery, *For Pride Month, Biden Should Probably Fill the Courts with Lesbian Judges*, HUFFINGTON POST (June 9, 2022), [www.huffpost.com/entry/lesbian-federal-judges-biden\\_n\\_62a22befe4b04a61734bd897](http://www.huffpost.com/entry/lesbian-federal-judges-biden_n_62a22befe4b04a61734bd897). For earlier confirmation of numerous LGBTQ judges, *see* Carl Tobias, *Appointing Lesbian, Gay, Bisexual, Transgender and Queer Judges in the Trump Administration*, 96 WASH. U. L. REV. ONLINE 11 (2018). *But see In Record-Breaking Year for Judicial Nominations, Biden Fell Short on LGBTQ+ Representation*, LAMBDA LEGAL (Feb. 1, 2022), [www.lambdalegal.org/publications/report\\_biden-administration-fell-short-on-lgbtq-representation](http://www.lambdalegal.org/publications/report_biden-administration-fell-short-on-lgbtq-representation); *MALDEF Statement on the Biden Administration's Failure to Address Historical Latino Exclusion in Judicial Nominations*, MEXICAN AM. LEGAL DEF. AND EDUC. FUND (May 25, 2022), [www.maldef.org/2022/05/maldef-statement-on-the-biden-administrations-failure-to-address-historical-latino-exclusion-in-judicial-nominations/](http://www.maldef.org/2022/05/maldef-statement-on-the-biden-administrations-failure-to-address-historical-latino-exclusion-in-judicial-nominations/); David Savage, *Latinos Don't See Themselves Fully Reflected in Biden's Judicial Picks*, L.A. TIMES (Aug. 30, 2022), [www.latimes.com/politics/story/2022-08-30/latinos-dont-see-themselves-fully-reflected-in-bidens-judicial-picks](http://www.latimes.com/politics/story/2022-08-30/latinos-dont-see-themselves-fully-reflected-in-bidens-judicial-picks).

surpass fifty percent.<sup>160</sup> Endeavors to increase ethnic, gender, and sexual orientation diversity require only a concise disquisition in this article because the President has long insisted on the concerted treatment to expand minority representation and frequently reaffirms this commitment. His appointments team implemented salutary efforts, manifested in Biden's extraordinarily diverse confirmees and nominees.

Trump's abysmal record on federal court diversity merits intensive focus. For instance, his White House effectuated negligible initiatives to enhance representation by including diverse employees on appointments groups or urging politicians in home states to vigorously pursue, consider, and recommend outstanding minority choices. Trump nominated only two LGBTQ people, less than forty ethnic-minority individuals, no Black candidate, and merely one Latina for appellate court vacancies, and he confirmed only half the percentage of women whom Obama had confirmed.<sup>161</sup>

Biden, upper-echelon White House staff, and Justice Department personnel instituted concrete endeavors to ensure that ethnic, gender, and sexual orientation diversity receive substantial priority and to communicate to selection participants that minority representation is essential. In fact, Dana Remus, who served as Biden's first White House Counsel, advanced diversity by conveying the significance of diversity in selection to her office, the Justice Department, the panel, and home-state politicians. Thirty days before Remus was officially named Counsel by the President, she duly requested that members extend before Inauguration Day submissions for nominees with broad, robust "life and professional experiences."<sup>162</sup>

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160. *E.g.*, Robert Barnes, *Jackson's nomination is historic, but her impact On Supreme Court in short term will likely be minimal*, WASH. POST (Feb. 27, 2022), <https://www.washingtonpost.com/politics/2022/02/25/ketanji-jackson-impact-on-supreme-court/>; Carl Hulse, *Biden, A Veteran of Supreme Court Fights, Ponders His Historic Pick*, N.Y. TIMES, Feb. 12, 2022, at A11; White House, Off. of the Press Secretary, *President Biden Announces Twelfth Round Judicial Nominees* (Dec. 23, 2021) (record-setting empirical information which discusses numerous Supreme Court, appellate court, and district court "firsts"); 167 CONG. REC. S4,735, S4,748 (confirming Ketanji Brown Jackson to the D.C. Circuit and the Supreme Court).

161. Black women comprise Biden's first Supreme Court nominees, and initial four and four subsequent appellate court appointees, while five more Black nominees await confirmation. *See supra* notes 44-46, 154-60 and accompanying text; *see also* ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Confirmations (last updated Oct. 15, 2022).

162. She sought experiences "underrepresented on the federal bench, . . . public defenders, civil rights and legal aid attorneys[.]" and "those based on race, ethnicity, gender, sexual orientation, gender identity, religion, veteran status, and disability." *See supra* notes 98, 159 and accompanying text; Press Releases, *supra* note 95 and accompanying text (documenting Biden's nomination of LGBTQ candidates).

The White House Counsel articulated priorities that presently improve diversity. Many Counsel Office employees, some of whom work on nominations, are minorities. Biden commits substantial resources to enhancing diversity. Nominations participants seek out, contemplate, and forward rigorous people of color, women, and LGBTQ choices, and must continue doing so by actively contacting numerous individuals, lawmakers, and ethnic minority, women's, and LGBTQ political committees, including, for example, the American Constitution Society (ACS) and Demand Justice, who have knowledge of remarkable and diverse prospects. The latter two organizations compile and send to the White House comprehensive lists of highly qualified, experienced, diverse candidates for judicial nomination.<sup>163</sup> After White House Counsel persuades home-state officials to peruse and tender superb minority choices, the Office examines, interviews, and proposes the candidates, and asks that Biden carefully consider nominating those individuals recommended. The President leads by example with nominations, prevailing on substantial numbers of senators to quickly process and carefully support nominees. Biden and his staff ought to keep following their tested measures and accessing the constructs detailed in this piece.

Expanding ideological diversity also warrants considerable effort. Former President Trump and numerous GOP senators made campaign promises across the three most recent election cycles, and constantly implemented specific plans, which filled all court of appeals openings with very conservative jurists to the exclusion of various other indicia of quality. The Republicans enjoyed success in this effort, and significantly changed ideological equilibrium in the courts. Biden subsequently described the appellate courts as “out of whack,” and now as chief executive pledges to restore ideological balance.<sup>164</sup>

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163. SUPREME COURT SHORTLIST, DEMAND JUSTICE (2020); Tom McCarthy, *Biden Under Pressure From Progressives As He Prepares to Pick First Judges*, GUARDIAN (Mar. 2, 2021, 3:00PM), [www.theguardian.com/us-news/2021/mar/02/joe-biden-judge-picks-federal-courts-supreme-court](http://www.theguardian.com/us-news/2021/mar/02/joe-biden-judge-picks-federal-courts-supreme-court); Tillman, *supra* note 97. *But see supra* notes 25-28 and accompanying text (documenting greater Federalist Society input into Trump's nomination and confirmation processes). Suggesting that Biden continue relying upon these two entities could be vulnerable to the above criticism of Trump for depending too substantially on the Federalist Society. However, Biden has relied much less significantly on the two entities than Trump depended on the Federalist Society. Moreover, there is a difference in kind versus degree (1) in the type of influence that the Federalist Society exercised respecting Trump Administration selection and that the two entities exercise regarding Biden Administration selection and (2) in the type of organizational structure, networking capacity, and resources which the Society enjoys and the two entities possess.

164. David Goldiner, *'It's Getting Out of Whack': Biden Plans Review on Possible Supreme Court Packing*, N.Y. DAILY NEWS (Oct. 22, 2020, 9:25AM), <https://www.nydailynews.com/politics/biden-plans-review-possible-supreme-court-packing-2020-10-22/>

The appeals courts experience only *nine* current and *seven* future vacancies, although Biden has multiple ways that he can proceed. First, Biden could dutifully wait for openings to materialize when judges assume senior status or retire.<sup>165</sup> Plentiful jurists could change status, and many judges have taken senior status or retired since Biden captured presidential election. Numerous jurists whom Democratic and Republican Presidents appoint consistently seem to wait for members of the same party to be elected President, so that a President of the same party would have the opportunity to confirm successors.<sup>166</sup> Encouraging or pressing judges to alter status is potentially fraught. Nonetheless, then-Majority Leader McConnell reportedly broached this precise topic with some jurists during Trump's presidency, and former Judiciary Committee Chair Graham publicly urged that numerous active jurists become senior judges or retire during Trump's final two years.<sup>167</sup> These methods provoke controversy, because few as-

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nydailynews.search.yahoo.com/click/\_ylt=AwrFcjqo5XZjGdsBVvr\_nIIQ;\_ylu=Y29sbwNiZjEEcG9zAzIEdnRpZAMEc2VjA3Nj/RV=2/RE=1668765224/RO=10/RU=https%3a%2f%2fwww.nydailynews.com%2fnews%2fpolitics%2fus-elections-government%2fny-supreme-court-biden-commission-20201022-4vack3ecibadnkk76ldnkn6dky-story.html/RK=2/RS=57KUHNmAQd2iP9o.ofmJ-nRaCPLI-; Carl Hulse & Michael Shear, *Biden Creating Commission to Study Expanding the Supreme Court*, N.Y. TIMES, (Apr. 9, 2021), at A13.

165. See 28 U.S.C. § 371 (most judges assume senior status once they reach sixty-five and complete fifteen years of service, which is denominated the "Rule of Eighty," a smaller number of jurists retire, and quite a few remain in judicial service until they die). See generally David Stras & Ryan Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007).

166. Republican and Democratic appointees behave comparatively similarly. This practice at most is a custom, which significant numbers of judges do *not* follow. ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Future Vacancies (last updated Oct. 15, 2022); Marimow, *supra* note 97; Jacqueline Thomsen, *Bench Report: It's Crunch Time for Circuit Court Retirements. Plus, the Ninth Circuit Got Its First Biden Appointees*, LAW.COM (Dec. 16, 2021, 5:05 PM), <https://www.law.com/2021/12/16/bench-report-its-crunch-time-for-circuit-court-retirements-plus-the-ninth-circuit-got-its-first-biden-appointees/>; Tillman, *supra* note 97.

167. S Judiciary Comm., *Exec. Business Mtg.*, May 28, 2020; Carl Hulse, *McConnell Has a Request for Veteran Federal Judges: Please Quit*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/us/politics/mcconnell-judges-republicans.html>; Felicia Sonmez, *Graham Urges Senior Judges to Step Aside before November Election so Republicans can fill Vacancies*, WASH. POST (May 28, 2020), [https://www.washingtonpost.com/politics/graham-urges-senior-judges-to-step-aside-before-november-election-so-republicans-can-fill-vacancies/2020/05/28/4b014d78-a0fc-11ea-b5c9-570a91917d8d\\_story.html](https://www.washingtonpost.com/politics/graham-urges-senior-judges-to-step-aside-before-november-election-so-republicans-can-fill-vacancies/2020/05/28/4b014d78-a0fc-11ea-b5c9-570a91917d8d_story.html); see also Joe Sonka et al., *How Joe Biden's Deal with Mitch McConnell to Seat an Anti-Abortion Judge Crashed and Burned*, LOUISVILLE COURIER-JOURNAL (Aug. 17, 2022), <https://www.courier-journal.com/story/news/politics/mitch-mcconnell/2022/08/17/how-bidens-anti-abortion-judge-pick-ran-headlong-roes-reversal/7788913001/>. No evidence exists that Biden, White House staff, or Democratic senators have engaged in the type of behavior that the GOP senators perpetrated.



pects of life could seem more delicate and private than changing status, and the notion makes courts appear politicized. One dispute even instigated an ethics complaint at the U.S. Court of Appeals for the D.C. Circuit.<sup>168</sup> In short, suggesting status change is not a preferable solution to ideological imbalance on the courts. A second remedy for appellate court ideological disequilibrium would be creating additional judgeships. For example, the Judicial Conference aptly recommends that Congress authorize two additional Ninth Circuit slots, which it appropriately premises on conservative estimates that involve work and caseloads, although certain tribunals may need substantially greater numbers of judgeships than the Conference presently recommends.<sup>169</sup>

Experiential diversity relates to diversity in terms of ethnicity, gender, sexual orientation, and ideology. The Counsel addressed these precise linkages among the various important diversity elements by requesting that home-state officers provide a number of submissions with experience “underrepresented on the bench, including public defenders, civil rights and legal aid” counsel, which most senators decide to respect. Biden deftly created records for nominating and confirming lawyers who possess a broad spectrum of experiences.<sup>170</sup>

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168. Letter from Katie O’Connor, Sr. Couns., Demand Just., to Sri Srinivasan, Chief Judge of D.C. Circuit, Re: Griffith Retirement, DEMAND JUST. (Mar. 19, 2020), <https://demandjustice.org/letter-to-chief-judge-of-dc-circuit-re-griffith-retirement/>; see Carl Hulse, *Roberts Rejects Request for Inquiry Into D.C. Appeals Court Vacancy*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/08/us/roberts-appeals-court-vacancy.html>; Adam Liptak, *Breyer Says He’s Weighing the Right Time to Exit*, N.Y. TIMES, Aug. 28, 2021, at A14.

169. See JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE 23 (2021). For appellate court needs, see *Hearing on The Need for New Lower Court Judgeships, 30 Years in the Making before the H. Judiciary Subcomm. on Cts., Intell. Prop., and the Internet*, 117th Cong. (Feb. 24, 2021); Merritt McAlister, *Rebuilding the Federal Circuits*, 116 NW. U. L. REV. 1137, 1209 (2022); Xiao Wang, *In Defense of (Circuit) Court-Packing*, 119 MICH. L. REV. ONLINE 32 (2020); Thomas Berry, *The U.S. Needs More Federal Judges*, WALL STREET J. (Mar. 9, 2021, 12:39PM), [www.wsj.com/articles/the-u-s-needs-more-federal-judges-11615311539](http://www.wsj.com/articles/the-u-s-needs-more-federal-judges-11615311539). For legislation in the 117th Congress, see S. 2535, 117th Cong. (2021), H.R. 4886, H.R. 4885, 117th Cong. (2021). House Judiciary Subcommittee on the Courts, Intellectual Property, and the Internet Chair Hank Johnson recently introduced the Circuit Court Judgeships Act of 2022, H.R. 8936, 117th Cong. (2022), that would authorize fifty-one new appellate judgeships.

170. Former White House Counsel Dana Remus proclaimed that candidates’ work and life experiences should reflect “race, ethnicity, national origin, gender, sexual orientation, gender identity, religion, veteran status, and disability.” Press Release, *supra* note 1; Tierney Sneed, *Inside Democrats’ Quest To Nominate Judges Who Break Ex-Prosecutor Mold*, CNN (July 28, 2021), [www.cnn.com/2021/07/28/politics/biden-judicial-nominations-public-defenders-professional-diversity/index.html](http://www.cnn.com/2021/07/28/politics/biden-judicial-nominations-public-defenders-professional-diversity/index.html); see *supra* notes 95–119, 162 and accompanying text. Senators Cotton, Cruz, Grassley,

Perceptive critics of judicial selection dynamics have perennially aired similar concerns regarding overrepresentation of prosecutors and civil, corporate, defense attorneys who are employed in substantial law firms.<sup>171</sup>

Senators must comprehensively evaluate initiatives that allow the chamber to reestablish distinctive “regular order.” One discrete possibility is magnifying the rigor that attends the entire confirmation system. For instance, the panel should engage in complete, less hurried, nominee probing, which encompasses American Bar Association information’s thorough assessment. The committee must fully examine nominees during hearings and robustly discuss their capabilities ahead of ballots. Finally, the chamber should participate in rigorous debates before confirmation votes.

However, to the extent that Trump and Republican senators routinely capitalized on “regular order’s” alteration to pack the appellate courts and undermine diversity, Biden and senators can pursue relatively similar approaches to swiftly fill vacancies and rebalance the courts. The clearest illustration is the circuit “blue slip” exception, which permitted Trump and Republican senators to fill the courts of appeals with significant numbers of highly conservative, accomplished jurists comprising white, heterosexual, male prosecutors and counsel from substantial law firms. Because not all Republican senators have cooperated with the Democrats, Biden and each party’s senators have continued invoking, and might directly retain, certain devices which Republicans deployed, such as the appellate court “blue

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and Hawley criticized practically all of the many appellate and district court nominees who had served as criminal defense counsel, particularly in the federal system, for lacking civil experience and even characterized a number of the nominees as “radical activists.” See also June 9, 2021 Hearing, *supra* note 125, Sept. 7, 2022 Hearing *supra* note 125; *Hearings on Nominees Before the S. Judiciary Comm.*, 117th Cong. (Oct. 20, 2021); *Hearings on Nominees Before the S. Judiciary Comm.*, 117th Cong. (Feb. 16, 2022); *Hearings on Nominees Before the S. Judiciary Comm.*, 117th Cong. (Mar. 2, 2022); *Exec. Bus. Meeting Before the S. Comm. On the Judiciary*, 117th Cong. (Aug. 5, 2021) (Statement of Sen. Chuck Grassley).

171. E.g., Maggie Buchanan, *The Startling Lack of Professional Diversity Among Federal Judges*, *CTR. FOR AM. PROGRESS* (June 17, 2020), <https://www.americanprogress.org/article/startling-lack-professional-diversity-among-federal-judges/>; Joanna Shepherd, *Jobs, Judges and Justice: The Relationship between Professional Diversity and Judicial Decisions*, *DEMAND JUST.* (2021), [http://demandjustice.org/wp-content/uploads/2021/02/Jobs-Judges-and-Justices\\_Joanna-Shepherd-report\\_2021.pdf](http://demandjustice.org/wp-content/uploads/2021/02/Jobs-Judges-and-Justices_Joanna-Shepherd-report_2021.pdf); see also Jennifer Bendery, *Progressive Groups Ask Senators To Commit To No Corporate Lawyers for Biden’s Judge Picks*, *HUFFINGTON POST* (Mar. 16, 2021), [https://www.huffpost.com/entry/progressive-groups-corporate-lawyers-biden-judges-diversity\\_n\\_6050e762c5b685610fd2f949](https://www.huffpost.com/entry/progressive-groups-corporate-lawyers-biden-judges-diversity_n_6050e762c5b685610fd2f949); David Lat, *Biden’s Judges Diversify the Bench*, *L.A. TIMES*, (Dec. 22, 2021), <https://www.latimes.com/opinion/story/2021-12-22/bidens-judicial-nominations-diversity-federal-courts>.

slip” exception, until they achieve the diversity requisites, especially ideological balance.<sup>172</sup> Were the GOP to prove determinedly recalcitrant, Democrats could review and install a district court “blue slip” exception.<sup>173</sup>

### C. Longer-Term Suggestions

This inquiry suggests that the confirmation wars (which predated Trump’s 2016 election) rampantly escalated after his 2017 inauguration. This phenomenon is exemplified on one hand by Democrats’ infrequent concurrence with allowing confirmation ballots, and on the other hand by Republican detonation of the nuclear option to reduce cloture vote margins on nominees and to reduce post-cloture district court nominee debate hours from thirty to two.<sup>174</sup> Persuasive indicia show that it is now past the time to eliminate or temper the prolonged confirmation wars, including the (1) few confirmations which President Obama and the Republican Senate majority attained in 2015–16; (2) counterproductive process spiral downward evidenced by incessant paybacks, stark politicization, and the GOP’s refusal to analyze D.C. Circuit Chief Judge Garland, as Obama’s Supreme Court nominee; (3) refusal to coordinate between Republicans and Democrats over Trump’s checkered presidency; and (4) complex selection dilemmas. Presidential and senatorial contravention, revision, or diminution of appointments processes that previously operated comparatively well have severely aggravated this decline. Republican delay when confirming Garland, as Biden’s Attorney General nominee, and Republican and Democratic lock step panel, cloture, and confirmation votes

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172. For Democrats’ retention of the appellate court “blue slip” exception, *see Exec. Bus. Meeting Before the S. Comm. on the Judiciary*, 117th Cong. (Jan. 20, 2022); *Exec. Bus. Meeting Before the S. Comm. on the Judiciary*, 117th Cong. (Feb. 10, 2022); *Exec. Bus. Meeting Before the S. Comm. on the Judiciary*, 117th Cong. (Mar. 2, 2022); *see also* Hulse, *supra* note 105. Appellate court slips do foster White House consultation and protect senators’ selection prerogatives, so circuit slips deserve review and possible reinstatement after the President and the Senate realize important diversity elements. *See supra* note 153 (providing analogous ideas regarding the American Bar Association’s selection role).

173. *See* Hulse, *supra* note 105 (documenting Durbin’s allusion to a district court exception); *see also supra* note 51 and accompanying text (documenting GOP retention of the district court “blue slip” policy).

174. Tobias, *supra* note 21, at 1107; *see supra* notes 61–62, 68 and accompanying text (documenting that Republican senators reduced the Supreme Court and district court nominee debates from thirty to two hours); John Gramlich, *Trump Federal Judicial Picks Are Contentious*, PEW RESEARCH CTR. (Mar. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/03/07/federal-judicial-picks-have-become-more-contentious-and-trumps-are-no-exception/>.

epitomize how the serious negative phenomena may acutely persist in the future.<sup>175</sup>

A salient reason why these dynamics continued across 2020 was extreme misuse of the custom known as the Thurmond or the Leahy Rule, which had previously required that the nomination and confirmation processes slow, and ultimately halt, early in presidential election years.<sup>176</sup> This convention derived support from respecting the public preferences manifested in elections that implicate the subsequent President and Senate. Examples of the tradition's consummate perversion include when the GOP determinedly rejected Garland as a Justice substantially before the 2016 elections, despite confirming *one* appeals court and eight district court judges in the 2016 presidential election year. These dynamics were in contradistinction to the GOP (1) aggressively confirming Justice Barrett merely one short week before former President Trump lost his reelection campaign and (2) seating fourteen appellate court and district court jurists *after* Biden secured election, in combination with thirty-one more nominees in the concluding year of Trump's presidency.<sup>177</sup> The GOP's recalcitrance in 2016 simultaneously contrasted to the then-nascent Democratic majority which carefully and dutifully helped confirm ten appellate court, and fifty-eight trial court, judges in President George W. Bush's last half term.<sup>178</sup>

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175. Marianne Levine, *Durbin and Graham Feud Over Garland Confirmation Hearing*, POLITICO (Feb. 1, 2021), <https://www.politico.com/news/2021/02/01/merrick-garland-ag-confirmation-hearing-464593>. Substantial numbers of Republican senators, except Graham, Susan Collins, and Lisa Murkowski, vote no in lock step regarding practically all Biden appellate court, and many district court, judicial nominees; all Democratic senators consistently vote yes. Alexander Bolton, *McConnell Vows To Be 'Picky' With Biden Nominees If GOP Wins Senate*, THE HILL (June 27, 2022); Jordain Carney, *Biden court picks face fierce GOP opposition*, THE HILL (Jan. 2, 2022), <https://thehill.com/homenews/senate/587609-bidens-court-picks-face-fierce-gop-opposition/>; Marimow, *supra* note 97; Elizabeth Williamson, *Hundreds of Biden Nominees Stuck in Senate Limbo Amid G.O.P. Blockade*, N.Y. TIMES, Jan. 8, 2022, at A1; Avalon Zoppo, *Bench Report: Nominations Watch*, LAW.COM (Sept. 15, 2022), <https://www.law.com/2022/09/29/bench-report-will-courts-remain-open-if-the-government-shuts-down-and-judicial-watch/>; *see supra* notes 127–30 and accompanying text.

176. *See* Carl Tobias, *The Transformation of the Thurmond Rule in 2016*, 66 EMORY L. J. ONLINE 2001 (2016).

177. *See supra* notes 21–22 and accompanying text; *see also* ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Confirmations (last updated Oct. 15, 2022).

178. *See* Tobias, *supra* note 22, at 31–32. The Republican majority's deployment of the Thurmond Rule to undercut Obama's 2015–16 appellate court selection and the GOP majority's rapid, flaccid 2017–20 appellate court confirmation process, which permitted approval of some less qualified judges, merited the rule's vigorous 2020 deployment, but the Republican majority did not allow that to happen. *See supra* note

The November 2020 federal election results that flipped control of the Presidency and the Senate create opportunity for reform. The Democratic and Republican parties will be extremely unclear about which might capture the Senate and Congress during 2022 and the chamber, the House of Representatives, and the chief executive office two years later and directly capitalize on these changes. Those specific circumstances indicate that the near term will be replete with uncertainties and opportunities for compromise. Therefore, 2022 and most of the next few years can be auspicious occasions for passing additional longer-term, durable, solutions, while the President and the Senate need to respect fundamental constitutional appointments duties with meaningful cooperation that adopts pragmatic suggestions.<sup>179</sup> Ideal times for prescribing the solutions would be prior to the 2022 mid-term or the 2024 Senate and presidential elections, as negligible clarity about the results of those contests will supply both parties greater incentives to compromise.

Democrats and Republicans may agree to a distinctly less politicized confirmation system through a bipartisan judiciary's effective institution which allows the party without executive control to submit a percentage of judicial nominees.<sup>180</sup> Multiple jurisdictions' senators have implemented relatively analogous endeavors in varying periods. New York senators proposed the first construct that enabled the senator whose party lacked the administration to send one in a couple of district court picks; this mechanism has functioned effectively since the 1970s.<sup>181</sup> Pennsylvania offers a modern alternative, which is noteworthy because it has a split delegation. Senators Casey and Patrick Toomey (R) rely on numerous bipartisan merit selection panels, which have canvassed and suggested well-qualified, mainstream, diverse prospects since 2011.<sup>182</sup> The lawmaker whose party

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177 and accompanying text. This concept should be codified in a rule with specific dates. Tobias, *supra* note 176.

179. For numerous longer-term ideas that can rectify or temper the interminable confirmation wars, see Michael Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal To Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 298–311 (2012); Tobias, *supra* note 25, at 2255–65.

180. 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 (2016) (affording numerous operational specifics of a bipartisan judiciary).

181. See generally Stephen Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 249 (1999).

182. Press Release, Senators Casey and Toomey Continue Bipartisan Agreement on District Vacancies, Mar. 10, 2017; see also *Hearing on Nominees Before the S. Judiciary Comm.* (Sept. 7, 2022) (statements of Senators Casey and Toomey). But see

does not occupy the White House might submit one in three or four possible nominees.<sup>183</sup> Senators who represent additional jurisdictions, particularly California, Illinois, and Washington, have cautiously effectuated relatively similar policies.<sup>184</sup>

Different procedures control in various states and would comprise matters for negotiation between the jurisdictions' legislators and those officials and the President.<sup>185</sup> Central should be determining the percentage of selections whom the party lacking the chief executive sends, how many this party tenders for each vacancy, and whether picks need to be ranked.<sup>186</sup> With split delegations, it may be pertinent whether a senator or the President can first rank specific prospects, and how to best navigate crucial disputes that materialize between the home-state politicians and the White House. Perhaps, the lawmakers could proffer one choice at a time until the chief executive agrees, because the propositions embody constitutional phrasing and considerable contemporary practice.<sup>187</sup>

A related consideration is which tribunals are eligible to implement this policy. The District of Columbia District Court, might require exclusion, because the District of Columbia possesses no senators, Presidents usually spearhead this process, and its cases are unique.<sup>188</sup> Because appellate court openings are rare and the courts of

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Max Mitchell, *Why Empty Seats on Pennsylvania's Federal Courts Are Lingerin*, LEGAL INTELLIGENCER, Feb. 28, 2022.

183. See *supra* note 180. Illinois employed a comparatively similar approach when its Senate delegation was divided, while Senators Durbin and Tammy Duckworth retain this approach. Tobias, *supra* note 133; see *supra* note 142 and accompanying text.

184. Tobias, *supra* note 50, at 916; see Tobias, *supra* note 133. These agreements have proceeded informally in the states, while some are customary and not reduced to writing. In the Senate, the preferable approach may be a Senate resolution adopted at the outset of a session like the resolution that governs bipartisanship on committees in the 117th Senate. See, e.g., S. RES. 27, 117th Cong. (2021). This comports with Article II, because the party lacking the White House would tender suggestions, which the President could follow or reject until the home-state senators and the President reach accord on a nominee.

185. See *supra* note 180 and accompanying text. But see *Confirmation Hearings on Federal Appointments Before the S. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Sen. Joseph Biden); *infra* notes 193–94 and accompanying text.

186. Most senators allow opposition members to suggest one in every three or four candidates. In 2022, in states with split delegations, a GOP senator or senior elected official would propose someone. Senators then must attempt to cooperate with each other and the President.

187. Because the president and senators may ultimately differ, senators should also recommend multiple candidates and rank the picks to increase flexibility and expedite selection by obviating the need to start over.

188. The district court resolves many interbranch disputes and federal administrative agency appeals. See Emily Cochrane, *House Backs D.C. Statehood*, N.Y. TIMES, Apr.

appeals comprise multiple jurisdictions, a bipartisan judiciary would seem to operate relatively efficaciously for larger tribunals.<sup>189</sup> However, perceptions that seating circuit jurists appears politicized, complex, and critical—as appeals court opinions enunciate salient policy—suggest that appellate tribunals’ inclusion would be problematic.

Congress should implement bipartisan courts to fill remaining vacancies, even though a few appellate courts now seem to warrant considerably more judgeships.<sup>190</sup> This proposal would adopt the Judicial Conference of the United States’ recommendations for lawmakers that directly accord tribunals basic resources which jurists plainly need to deliver justice.<sup>191</sup> These measures could first govern across 2023 or two years later, so that neither party may essentially capitalize on initiation to game the selection regime.<sup>192</sup>

Tethering a bipartisan judiciary to seventy-seven new trial court posts as a policy package would supply plenty of benefits. They might end or slow the process’ downward spiral while affording (1) parties’ incentives to collaborate, (2) jurists who are relatively diverse regarding core elements, and (3) substantial, necessary judicial resources for district courts. Passage during 2022 or thereafter with phased implementation over 2023 or two years later would restrict the parties’ opportunities to exact unfair gain. Yet application will mandate significant care. For instance, Biden, as a senator, disparaged a related notion by deeming this route unconventional.<sup>193</sup> However, the unprecedented confirmation wars that have long poisoned judicial appointments, as well as the constitutionality of the reforms proposed,

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23, 2021, at A20 (rejecting D.C. senators); *see also* Tobias, *supra* note 50, at 917 (analyzing certain issues that districts with comparatively few judges confront).

189. The states which are included in each appellate court must have at least one active judge serving on the tribunal. 28 U.S.C. § 44(c).

190. JUD. CONF. REPORT, *supra* note 169; Tobias, *supra* note 62, at 140; *see supra* note 169 and accompanying text. If the judicial selection process does not improve, additional judgeships will not improve the process or alleviate the vacancy crisis.

191. *See supra* note 169 and accompanying text (documenting the Judicial Conference recommendations and the most recent comprehensive judgeships bills).

192. When both political parties agree *before* elections, it is more difficult for Republicans and Democrats to game the system. Presidential election years are most felicitous, because the President can frequently be on the ballot and may want to cooperate with Congress.

193. Senator Biden was referencing “trades,” which certain Republican senators proposed to President Clinton, *not* bipartisan courts. 143 CONG. REC. 4254 (1997) (statement of Sen. Joseph Biden). President Obama and Georgia Republican Senators Saxby Chambliss and Johnny Isakson deployed trades when they disagreed about nominees. Dan Malloy, *Georgia Delegations Partisan Split Even Extends to Furloughs*, ATLANTA J.-CONST., Oct. 15, 2013, at 14A; *see supra* note 32 and accompanying text; *infra* notes 203–04 and accompanying text.

indicate that Biden may well support bipartisan courts.<sup>194</sup> Effectuating that idea could appear difficult, but senators and representatives can easily address numerous predicaments that could materialize.<sup>195</sup>

Relevant also could be amending the judicial filibuster, which has been important to the confirmation wars. This avenue traditionally protected the chamber minority, although abuses show that it deserves refinement.<sup>196</sup> For example, deployment of the filibuster can be reserved for nominees who lack pertinent intelligence, experience, temperament, industry, character, or independence to serve as excellent jurists. This purpose may be satisfied by permitting filibusters only in “extraordinary circumstances,” a novel tool which functioned relatively well over 2005, so long as the contours of “extraordinary circumstances” are more specifically defined.<sup>197</sup> Moreover, these reforms might prompt reinstatement of sixty votes for cloture, a determination that would reverse the nuclear option’s 2013 explosion and potentially facilitate greater inter-party cooperation and endeavors.<sup>198</sup> However, Democrats’ perilously-thin Senate control and their vow to

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194. The bipartisan judiciary construct which Biden and Congress might effectuate is valid, as Biden has intimated. Bipartisan courts might politicize selection more or deny victors spoils, but they may enhance selection, the confirmation wars must end, and litigant needs should be central. *See generally* Josh Chafetz, *Unprecedented: Judicial Confirmation Battles and the Search for a Usable Past*, 131 *HARV. L. REV.* 96 (2017) (detailing the history of appointment and confirmation battles and novel approaches to dealing with partisanship); *see supra* notes 21–22, 62–68 and accompanying text (discussing the confirmation wars since 2009).

195. Congress has solved similarly thorny issues, namely, how to felicitously address substantial dockets with comparatively few resources, by authorizing judgeships, but the last comprehensive statute passed in 1990 and the appellate courts need more seats than the new bills propose. Pub. L. No. 101–650, §§ 201–06, 104 Stat. 5089–5104; *see* McAlister, *supra* note 169 (providing comprehensive assessment of why appellate courts require additional judgeships); Tobias, *supra* note 180 (proffering more ideas on issues that bipartisan courts raise).

196. For judicial filibuster abuse since 2009, *see supra* notes 21–22, 62, 68 and accompanying text. For dispute over the legislative filibuster, *see* 168 *CONG. REC.* S28–32 (daily ed. Jan. 5, 2022) (statements of Sens. Mitch McConnell & John Thune); Letter from Charles Schumer, Maj. Leader, to Colleagues of the U.S. Senate (Jan. 3, 2022), <https://www.democrats.senate.gov/imo/media/doc/Dear%20Colleague%201.3.22.pdf>.

197. *Senate Compromise on Judge Nominations*, *N.Y. TIMES* (May 24, 2005), <http://www.nytimes.com/2005/05/24/politics/24text.html>; *see* Michael Gerhardt & Richard Painter, “Extraordinary Circumstances”: *The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, 46 *U. RICH. L. REV.* 969 (2012).

198. *Lat*, *supra* note 171. Graham favored this, but the senator urged that the notion apply in 2021. Feb. 7, 2019 Meeting, *supra* note 51. For filibuster abuses that prompted 2013 explosion or the nuclear option, *see* May 7, 2019 Meeting, *supra* note 93; *see also* Tobias, *supra* note 62, at 126–28. *But see supra* notes 125–27 and accompanying text.



revive the diversity parameters indicate that the majority will not modify this filibuster soon.<sup>199</sup>

#### D. *Less Conventional Suggestions*

President Biden and numerous senators efficaciously instituted procedures that smoothly populated vacancies with talented, centrist, diverse jurists over a rather short period. Biden and the chamber need to keep doing so. The President and high-level staff meticulously consulted, and responded to, politicians from states with open positions, knowledgeably communicated, and dutifully reached fair compromises. These efforts must continue.<sup>200</sup> Nevertheless, instances will arise when senators decidedly fail to collaborate or are recalcitrant. Obama's experience proposing Texas nominees clearly demonstrated this in the past, and the same dynamic may occur in future red states where Biden has nominated comparatively small numbers of designees.<sup>201</sup> Even in those circumstances, the President and upper-echelon White House and Justice Department personnel could wish to foster

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199. Retaining fifty votes to restore diversity erodes regular order, so once the Senate restores diversity, so may it restore sixty votes. The filibuster can be one aspect of a larger solution. A useful custom was final votes on able, centrist district court nominees at recesses. Tobias, *supra* note 22, at 31; *see also supra* note 65 and accompanying text. Senators may invoke numerous other conventions to enhance diversity and "regular order."

200. Biden, Durbin and Grassley clearly follow these practices, White House and Senate staff should assume that all senators proceed in good faith and remember that they are picking judges, not fights. Continuing the confirmation wars squanders scarce resources and political capital. *See* EVAN OSNOS, *JOE BIDEN: THE LIFE, THE RUN, AND WHAT MATTERS NOW* (2020).

201. Carl Tobias, *Filling the Texas Federal Court Vacancies*, 95 TEX. L. REV. 170 (2017); Collins, *supra* note 21; *see* Feb. 10, 2022 Meeting, *supra* note 172; 168 CONG. REC. S4503 (daily ed. Sept. 8, 2022) (documenting confirmation of Andre Mathis to a Tennessee Sixth Circuit vacancy); Madison Alder, *Tennessee Senators Unhappy With Consultation on Judge Pick*, BLOOMBERG (Nov. 18, 2021), <https://news.bloomberglaw.com/us-law-week/tennessee-senators-decry-lack-of-consultation-on-judge-nominee>; Brad Kutner, *Biden's First Red - State District Court Nominee Sails Through Confirmation Hearing*, NAT'L L.J. (May 11, 2022), <https://www.law.com/nationallawjournal/2022/05/11/bidens-first-red-state-district-court-nominee-sails-through-confirmation-hearing/>; Jesse Scheckner, *Marco Rubio Committee Offers President Joe Biden Little Choice on South Florida Judicial Picks*, FL. POLS. (July 23, 2021), <https://floridapolitics.com/archives/443326-marco-rubios-committee-offers-president-joe-biden-no-wiggle-room-on-florida-judge-picks/> (providing example of selection complications which materialized in Florida where vacancies lack nominees). *But see* Sabrina Eaton, *Senate Approves Biden's Judicial Nominees for Northeast Ohio's Federal Courts*, CLEVELAND.COM (Feb. 1, 2022), <https://www.cleveland.com/news/2022/02/senate-begins-approving-judicial-nominees-for-northeast-ohios-federal-courts.html> (documenting how Democratic Senator Sherrod Brown and Republican Senator Rob Portman assiduously cooperated with one another and with the White House to confirm three experienced, mainstream Northern District

amicable resolution of disagreements. For example, when lawmakers tardily submit picks or retain “blue slips” of prospects whom the White House selected, the President should tender more consensus and diverse nominees until legislators relent. If these devices prove futile, Biden or his staff might want to either publicize the behavior’s adverse effects; showcase to the voters the harmful impacts of this conduct for litigants, courts, individual judges, and court personnel; or pursue recess appointments or similar nuanced practices that can embarrass the lawmakers.<sup>202</sup>

If the suggestions to improve diversity lack efficacy because the GOP Caucus or individual Republican legislators rebuff the approaches, Democrats may cautiously evaluate, and resort to, comparatively less-conventional actions. For instance, when Republicans eschew coordination by not proffering sufficient candidates or refuse to return nominees’ “blue slips” despite assertive presidential consultation, the Democratic majority should retain effective GOP alterations created throughout the Trump Administration—which include two hours for post-cloture debate on trial level nominees and the court of appeals “blue slip” exception—while perhaps implementing comparatively dramatic practices, such as a two-hour appellate court debate rule and introducing a district court “blue slip” exception, until the majority realizes all of the important diversity components.<sup>203</sup>

Trades would be another relatively unconventional solution, which can probably be reserved for desperate exigencies, and only after restoration of certain influential diversity parameters and exhaustion of the remedies scrutinized previously in this article.<sup>204</sup> For in-

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of Ohio judges); *see also supra* notes 182-84 and accompanying text (documenting similarly successful bipartisan appointments processes in numerous states).

202. Tobias, *supra* note 5, at 236 (publicizing corrosive effects); Tobias, *supra* note 25, at 2261 (taking the appointments issue to the voters and employing related ideas). *NLRB v. Noel Canning*, 573 U.S. 513 (2014) (confining the deployment of recess appointments).

203. Appellate court ideological balance has recently become a critically important element of diversity. Micah Schwartzman & David Fontana, *Trump Picked Youngest Judges to Sit on the Bench. Your Move, Biden*, WASH. POST (Feb. 16, 2021), <https://www.washingtonpost.com/outlook/2021/02/16/court-appointments-age-biden-trump-judges-age/>; Dahlia Lithwick, *There is a Reason Why Biden is Slow to Install Judges*, SLATE (Mar. 23, 2021), <https://slate.com/news-and-politics/2021/03/why-biden-slow-judges.html>; *see supra* notes 47-51, 68, 172 and accompanying text (analyzing the two-hour debate rule, the appellate court “blue slip” exception, and a district court “blue slip” exception).

204. Jeremy Stahl, *Republicans Abolishing Judicial Appointments Norms Again*, SLATE (Feb. 22, 2019), <https://slate.com/news-and-politics/2019/02/trump-judicial-appointments-mcconnell-democrats-chris-kang.html> (using dramatic ideas of Christopher Kang, who led much Obama judicial selection and currently represents Demand

stance, the experiences of California and New York distinctly signify trades' imperfections. A revealing example was Trump's concerted selection endeavors to appoint highly conservative judges for all Ninth Circuit vacant slots assigned to California practically a year *before* he seated one prospect in any of seventeen California district court emergency positions.<sup>205</sup> In short, trades must continue to serve as a last resort.<sup>206</sup>

#### CONCLUSION

President Joe Biden and numerous Democratic and Republican senators have promising opportunities to diligently rectify or slow the confirmation wars that former President Donald Trump and many Republican senators persistently compounded. Accordingly, Biden should collaborate with both parties' senators and dynamically reinvigorate diversity facets, particularly to balance the court of appeals ideological composition. The White House and chamber members also need to eliminate or sharply reduce the myriad district court openings—which have profoundly confounded initiatives that facilitate expeditious, inexpensive, and equitable resolution of cascading dockets—while Biden and the chamber should revitalize desirable “regular order.” Those activities will clearly benefit litigants, the federal judiciary, the presidency, the Senate, and the country.<sup>207</sup>

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Justice); *see supra* note 193 and accompanying text (documenting Biden perspectives on trades).

205. ADMIN. OFF. OF THE U.S. CTS., VACANCIES IN THE FED. JUDICIARY, Judicial Confirmations, 116th Congress (last updated Dec. 1, 2020); Tobias, *supra* note 5, at 235 (documenting four Ninth Circuit vacancies in judgeships assigned to California and comparatively similar circumstances regarding New York).

206. Trades may work in jurisdictions with uncooperative Republican senators, and even then, only after restoring diversity, restoring “regular order,” and performing a finely calibrated analysis of vacancy magnitude and length and elections' proximity. *See supra* note 140 and accompanying text.

207. When this article was in production, Democrats secured a chamber majority with Nevada Senator Catherine Cortez Masto's retention of her position. Jonathan Weisman, *Catherine Cortez Masto, One of Democrats Most Vulnerable Senators, Eked Out a Win in Nevada*, N.Y. TIMES, Nov. 13, 2022, at A1. However, the final composition of the Senate in the 118th Congress will not be decided until the December 6 Georgia runoff election between Senator Raphael Warnock (D-GA) and Republican challenger Herschel Walker, because neither candidate secured a majority in the November 8 balloting. Should Walker defeat Warnock, each party would have the same number of Judiciary Committee members as it enjoys now, which means that party-line voting would yield tie ballots, thereby necessitating that Democrats secure majority floor votes to discharge nominees from the committee. *See S. RES. 27, supra* note 184.

