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Filling the Red State Federal Judicial Vacancies

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FILLING THE RED STATE FEDERAL JUDICIAL VACANCIES

*by: Carl Tobias**

ABSTRACT

District vacancies without nominees that plague red jurisdictions deserve emphasis in this Essay for several reasons. First, there are myriad district court jurists who trigger greater numbers of empty posts when they assume senior status, retire, or die, which triggers more issues. Legislators have created 677 active trial court positions, which dwarf the 179 active court of appeals judicial posts. The trial courts are tribunals of last resort for most cases; their numerous jurists are the only court members that many litigants encounter, and significantly more district court openings lack nominees. In contrast, appellate courts explicitly articulate considerable policy, include multiple states, and enunciate precedent, which strictly binds trial level judges in each circuit's purview.

Vacancies' substantial quantity and protracted character impose serious complications. Extensive openings increase pressure on all jurists, court staff, and litigants by prolonging resolution. Litigants who file civil suits particularly feel the pressure of judicial vacancies. The prevalence and duration of many red state trial court vacancies without nominees essentially inflict adverse effects that may prevent judges from satisfying their duties to ensure expeditious, inexpensive, and equitable disposition under Federal Rule of Civil Procedure 1. Accordingly, that issue requires scrutiny, which this Essay undertakes.

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I. INTRODUCTION

In this federal election year, citizens and the government confront severe international and equally profound domestic concerns. Americans fear that the horrific Russian invasion of Ukraine could jeopardize Europe and detonate a nuclear catastrophe and that Hamas's calamitous strike on Israel and this country's relatively analogous counterattack will overwhelm the Middle East. At home, the public now clearly worries about democracy's strength, growing inflation, rampant politicization that eviscerates the federal government, the immigration conundrum, seditious domestic terrorism, and the prospect that voters must soon choose among candidates, none of whom might be an exceptional President.

Nevertheless, the citizenry has important reasons to appreciate President Joe Biden's fine leadership grounded in a half-century of experience as a U.S. Senator, Vice President, and specifically culminating with the presidency, and seasoned upper chamber politicians who govern with him. Biden and many senators protect global democracy while they restore and defend many U.S. institutions by working cooperatively with the Grand Old Party (GOP) to achieve salutary goals that each party supports, which bolsters a republican form of government.

One compelling domestic success is the pervasive revitalization and cautious enhancement of smooth, fair processes that nominate and confirm highly accomplished, mainstream judicial candidates, who increase diversity vis-à-vis ethnicity, gender, sexual orientation, ideology, and experience.¹ While productively leading the country since Biden's inauguration, he and many politicians—especially Senator Chuck Schumer (NY), who is the Majority Leader, and Senator Richard Durbin (IL), who discharges the role of Judiciary Committee Chair—promise to improve selection by reviving and enhancing certain nomination and confirmation rules and customs that former President Donald Trump and two Senate Republican majorities eroded by disregarding circuit “blue slips,” American Bar Association (ABA) ratings and evaluations, and other hallmarks of a fair and efficacious selection process.² Biden and numerous Democratic majority colleagues also vow to comprehensively rectify his predecessor's appointment of three extremely conservative Justices and fifty-four similar circuit jurists by approving nominees who can provide diversity in terms of the phenomena reviewed earlier.³ Biden and Senate Democrats have continued respecting these pledges since January 2021.⁴

In December 2023, Biden and the upper chamber reached significant milestones. They appointed the 125th trial court judge, eclipsing the district court jurists whom Trump had appointed

¹ See Carl Tobias, *How Biden Began Building Back Better the Federal Bench*, 78 WASH. & LEE L. REV. ONLINE 31, 31 (2021) [<https://perma.cc/HC8W-FRYM>].

² See Carl Tobias, *How Biden Could Keep Filling the Federal Circuit Court Vacancies*, 80 WASH. & LEE L. REV. ONLINE 1, 8–18 (2022) [<https://perma.cc/Z4C2-MLVV>]; see also Carl Tobias, *Keep the Federal Courts Great*, 100 B. U. L. REV. ONLINE 196, 221–24 (2020) [<https://perma.cc/VHD6-MXXF>] (describing comprehensively how former President Trump and Republican Senate majorities eroded the selection process).

³ See *Archive of Judicial Vacancies*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> [<https://perma.cc/2H7L-WLN4>] (providing confirmation information during 2017–2024); see also Carl Tobias, *How Biden Can Continue Making the Federal Courts Better*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y 43 (2022) [<https://perma.cc/58F5-YGHR>].

⁴ See *Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2021–2024).

at the same juncture in 2019.⁵ Moreover, 113 Biden confirmees were people of color or women.⁶ He approved fifty-five Black judges, which contrasts with Trump’s failure to pick even *one* Black appellate court jurist.⁷ Biden had recently confirmed the thirty-fifth Hispanic judge, which surpassed every president’s first term.⁸ He also confirmed to the Northern District of Oklahoma Sara Hill, who became the fourth indigenous woman whom Biden had proposed, which reveals that the chief executive marshaled half of the Native American federal jurists appointed over the entire history of the United States.⁹ Biden and the chamber as well eclipsed the confirmation record for lesbian, gay, bisexual, transgender, and queer (LGBTQ) choices in one term, which President

⁵ *Id.* (providing confirmation information during 2019–2023). *But see* Carl Hulse, *As Biden Judicial Confirmations Slow, Senate Gains Ground on Red-State Judges*, N.Y. TIMES (Jan. 29, 2024), <https://www.nytimes.com/2024/01/29/us/politics/biden-senate-judicial-confirmations.html> [https://perma.cc/J8TK-7ZPH] (asserting that Biden was then confirming fewer judges than Trump at a similar juncture in their presidencies).

⁶ *See Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2021–2024); *see also* John Gramlich, *Most of Biden’s Appointed Judges to Date Are Women, Racial or Ethnic Minorities - A First for Any President*, PEW RSCH. CTR. (Dec. 4, 2023), <https://www.pewresearch.org/short-reads/2023/12/04/most-of-bidens-appointed-judges-to-date-are-women-racial-or-ethnic-minorities-a-first-for-any-president/> [https://perma.cc/7253-X39U]. *But see* Carl Tobias, *President Donald Trump’s War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531, 531 (2019).

⁷ *See Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2017–2024); *see also* *Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> [https://perma.cc/ZKN4-AH7W] [hereinafter *Biographical Directory*] (providing data on Black federal judges by appointing president); *Hearing on Nominees Before the S. Judiciary Comm.*, 117th Cong. (Apr. 28, 2021) (statement of Sen. Durbin) (criticizing Trump’s failure to nominate a single Black appellate candidate).

⁸ *See Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2021–2024); *see also* *Biographical Directory*, *supra* note 7 (providing data on Hispanic federal judges by appointing president).

⁹ *See Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2021–23); *see also* *Biographical Directory*, *supra* note 7 (providing data on Native American federal judges by appointing president). Additional indigenous individuals whom Biden nominated and the Senate confirmed were District of Maryland Judge Lydia Griggsby, Western District of Washington Judge Lauren King, and Central District of California Judge Sunshine Suzanne Sykes. *See id.*; *infra* notes 54–64 and accompanying text (evaluating Hill’s confirmation process).

On April 24, 2024, President Biden announced that he intended to nominate Danna Jackson, who is another indigenous woman, for the District of Montana vacancy. Press Release, White House, President Biden Names Forty-Eighth Round of Judicial Nominees (Apr. 24, 2024), <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/04/24/president-biden-names-forty-eighth-round-of-judicial-nominees/> [https://perma.cc/MW82-VRTK]. However, Montana Republican Senator Steve Daines, “who chairs the Senate Republican campaign arm, . . . blocked Jackson’s nomination because he wasn’t consulted” by refusing to return Jackson’s blue slip. Garrett Downs, *Daines Blocks Judicial Nominee with Tribal, Interior Ties*, E&E NEWS (May 30, 2024), <https://www.eenews.net/articles/daines-blocks-judicial-nominee-with-tribal-interior-ties/> [https://perma.cc/97Y8-9X4E]. The White House spokesperson Andrew Bates criticized “Daines for blocking Jackson” and “depriving Montana of the talents of a principled, fair, and impartial jurist . . . who would make history as Montana’s first Native American federal judge.” *Id.*; *see also* Tiana Headley, *American Indian Court Pick Derailed by Senator Objection*, BLOOMBERG L. (May 23, 2024), <https://news.bloomberglaw.com/us-law-week/american-indian-court-pick-derailed-by-montana-senator-objection> [https://perma.cc/N3VX-CCHJ].

Barack Obama set in eight years.¹⁰ Finally, President Biden increased experiential diversity by appointing twelve circuit nominees who had rigorously defended individuals accused of crimes.¹¹

Even though Biden and the razor-thin Democratic majority realized numerous important measures of success, critical work does remain. For instance, districts have forty-six present and seventeen future vacancies: thirty-seven lack nominees, seven come in states represented by a pair of Democrats, while twenty-eight are for jurisdictions which two GOP members represent.¹² In distinct contrast, appeals courts suffer only one present “blue state” open position with a nominee, while the courts address merely six future unoccupied posts, and only the blue state of Delaware lacks a nominee.¹³

District vacancies without nominees that plague red jurisdictions deserve emphasis in this Essay for several reasons. First, there are myriad district court jurists who trigger greater numbers of empty posts when they assume senior status, retire, or die, which triggers more issues. Legislators have created 677 active trial court positions, which dwarf the 179 active court of appeals judicial posts.¹⁴ The trial courts are tribunals of last resort for most cases; their numerous

¹⁰ *Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2017–2024); *see* Jennifer Bendery, ‘Stunning Diversity’: How Joe Biden Reshaped the Courts in 2023, HUFFPOST (Dec. 28, 2023, 5:45 AM), https://www.huffpost.com/entry/joe-biden-federal-judges-diverse_n_658a1541e4b014ec45a26a9d [<https://perma.cc/DSU7-X3VB>]; Nicole Chavez, *At a Time of Uncertainty, LGBTQ+ Community Sees Meaningful Representation in Biden Judicial Nominees*, CNN (Feb. 8, 2024, 7:00 AM), <https://www.cnn.com/2024/02/08/us/ber-ner-dubose-federal-judge-nominations-rea/index.html> [<https://perma.cc/4GQL-74D2>].

¹¹ *See Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2021–2024).

¹² *Current Judicial Vacancies*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> [<https://perma.cc/DGE7-C37C>]; *Future Judicial Vacancies*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/future-judicial-vacancies> [<https://perma.cc/9BPU-R88E>]. Montana, Ohio, Wisconsin, and West Virginia have split delegations; Montana and Wisconsin experience one vacancy each; Ohio encounters two openings; the District of Columbia, which lacks senators, addresses two vacancies. Arizona and Vermont have one Democratic senator and one Independent member. Maine has one Republican senator and one Independent member. *Id.*; *Current Judicial Vacancies*, *supra*; *Senators*, U.S. SENATE, <https://www.senate.gov/senators/> [<https://perma.cc/RZ5S-3NYL>]. I emphasize the twenty-eight vacancies in red states; there are greater numbers of openings, and the vacancies are more difficult to fill.

¹³ *Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> [<https://perma.cc/LFD2-QRJ2>]. The red state of Tennessee has two future vacancies with nominees. In late January 2024, legal press outlets reported that Tennessee Sixth Circuit Judge Jane Branstetter Stranch was planning on assuming senior status. *See* Tiana Headley, *Sixth Circuit Judge Plans to Step Back, Give Biden New Vacancy*, BLOOMBERG L., (Jan. 29, 2024, 5:04 PM); <https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XCVF3OVG000000> [<https://perma.cc/44NS-6XYZ>]; Nate Raymond, *6th Circuit’s Stranch to Take Senior Status, Creating Court Vacancy*, REUTERS (Jan. 29, 2024, 1:53 PM), <https://www.reuters.com/legal/government/6th-circuits-stranch-take-senior-status-creating-court-vacancy-2024-01-29/> [<https://perma.cc/2QN9-PPLU>]. However, the Administrative Office of the U.S. Courts, the administrative arm of the federal courts, did not officially include Judge Stranch’s vacancy in its database as a future vacancy until June, even though it lists her vacancy notification date as January 22, 2024. On May 23, President Biden nominated Karla Campbell to Judge Stranch’s vacancy. *See* Press Release, White House, President Biden Names Fiftieth Round of Judicial Nominees (May 23, 2024), <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/05/23/president-biden-names-fiftieth-round-of-judicial-nominees/> [<https://perma.cc/WG9T-CUDQ>].

The Senate will confirm all of the current, and some of the future, vacancy nominees, but comparatively few new vacancies seem likely to materialize in the 2024 federal election year. *See Current Judicial Vacancies* and *Future Judicial Vacancies*, *supra* note 12. *But see infra* note 106.

¹⁴ *Judicial Vacancies*, *supra* note 13; 28 U.S.C. §§ 44, 133 (2018). I certainly am *not* blaming Congress or district court judges of whom more exist. Indeed, Congress should authorize the sixty-six district court judgeships that the United States Judicial Conference, the federal court policymaking arm, has strongly and repeatedly recommended premised on conservative estimates of cases and workloads because the courts require significantly greater judicial

jurists are the only court members whom a number of litigants encounter, and significantly more district court openings lack nominees.¹⁵ In contrast, appellate courts explicitly articulate considerable policy, include multiple states, and enunciate precedent, which strictly binds trial level judges in each circuit's purview.

Vacancies' substantial quantity and protracted character impose serious complications. Extensive openings increase pressure on all jurists, court staff, and litigants by prolonging resolution. Because the Speedy Trial Act distinctly elevates criminal prosecutions' importance, and the United States Constitution as well as the Federal Rules of Criminal Procedure grant defendants whom the United States government prosecutes numerous safeguards, litigants who file civil suits particularly feel the pressure of judicial vacancies.¹⁶ The prevalence and duration of many red state trial court vacancies without nominees essentially inflict adverse effects that may prevent judges from satisfying their duties to ensure expeditious, inexpensive, and equitable disposition under Federal Rule of Civil Procedure 1.¹⁷ Accordingly, that issue requires scrutiny, which this Essay undertakes.

Part II of this Essay provides a brief history of contemporary federal judicial selection. Part III surveys how the process functioned across Biden's tenure since his January 2021 inauguration. This Part finds that the procedures operated efficaciously in numerous states that have two Democratic senators yet worked less effectively for jurisdictions with a pair of GOP lawmakers, who often capitalized on "blue slips," which allowed them to veto potential candidates.¹⁸ However, Part III ascertains that particular Republican senators did cooperate with Biden to afford choices whom he marshaled next and the chamber approved, but other party members were not very helpful. Part IV reviews challenges that impede efforts to fill district open posts. The last Part, accordingly, proffers suggestions that could fill vacancies primarily in red states over 2024.

II. MODERN FEDERAL JUDICIAL SELECTION

Prescient observers of federal judicial appointments dispute whether there ever could have been a "Golden Age" of lower federal court selection and precisely when the "confirmation wars" actually began.¹⁹ Some commentators admonish that quite a few presidents' Supreme Court picks

resources. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 24–25 (2023); *see also* S. 4199, 118th Cong. (2024) (recent comprehensive judgeships legislation premised on the Judicial Conference's recommendations); *Executive Business Meeting Before the S. Judiciary Comm.*, 118th Cong. (June 13, 2024) (approving S. 4199 on a 20-0 vote); *infra* note 118.

¹⁵ Tobias, *supra* note 3, at 66; *see supra* note 12 and accompanying text.

¹⁶ *See* 28 U.S.C. §§ 3161–3174 (2018); *see also* U.S. CONST. amends. IV–VI; FED. R. CRIM. P.; Gary Fields & John R. Emshwiller, *Criminal Case Glut Impedes Civil Suits*, WALL ST. J. (Nov. 10, 2011), <https://www.wsj.com/articles/SB10001424052970204505304577001771159867642> [<https://perma.cc/FHV2-Z28H>]; Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL ST. J. (Apr. 6, 2015, 2:09 PM), <https://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746> [<https://perma.cc/FDM3-FFBR>].

¹⁷ FED. R. CIV. P. 1; *see* Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325 (1995).

¹⁸ *See* Carl Tobias, *Senate Blue Slips and Senate Regular Order*, 37 YALE L. & POL'Y REV. INTER ALIA 1 (2018).

¹⁹ I rely in this sentence and the next textual sentence on Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789-1861*, 100 IOWA L. REV. 551 (2015). Some believe that the modern war began with Senate rejection of D.C. Circuit Judge Robert Bork's Supreme Court nomination. *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).

lacked appointment in the Republic's first century.²⁰ During this and much of the next 100 years, selection generally proceeded well because the judiciary remained comparatively small, while most Presidents and Senates dutifully emphasized collaboration.²¹

Indeed, at the twentieth century's end, "regular order," defined as certain well-understood rules and customs, governed the appointments process.²² For instance, senators generally accorded deference to presidential nominee submissions, particularly for the regional circuits, as these courts encompass multiple states plus articulate significant policy, while their opinions supply precedent that binds district jurists within the courts of appeals.²³ In comparison, White Houses routinely afforded deference to candidate recommendations for district vacancies from home-state politicians, who essentially know more about in-state practitioners' competence.²⁴ Following nominations, similar requirements and conventions applied to the confirmation process. For example, the specific party in the minority did employ negligible lock-step panel or floor votes and rarely demanded cloture and roll call ballots.²⁵

However, many observers apparently find that the selection process "devolved into rampant dysfunctionality . . . [and] obstruction whereby Republicans and Democrats ratchet[ed] down the stakes" when Barack Obama was concluding his presidency.²⁶ Nonetheless, the selection regime deteriorated substantially further in the Trump Administration with cutthroat GOP erosion of rules and traditions, notably blue slips, pronounced lock-step committee and chamber floor ballots, voice voting, and decreased reliance on panel, cloture, and Senate confirmation.²⁷

²⁰ See Gerhardt & Stein, *supra* note 19.

²¹ *Id.*; STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 34–35, 78 (1995).

²² Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12, 13–14 (2016); see Tobias, *Keep*, *supra* note 2, at 198–99.

²³ BARRY J. McMILLION & DENIS STEVEN RUTKUS, CONG. RSCH. SERV., ROLE OF HOME STATE SENATORS IN THE SELECTION OF LOWER FEDERAL COURT JUDGES 22–23 (2013), <https://crsreports.congress.gov/product/pdf/RL/RL34405> [<https://perma.cc/6KRF-ND9C>].

²⁴ See Tobias, *Keep*, *supra* note 2, at 202.

²⁵ See BARRY J. McMILLION, CONG. RSCH. SERV., JUDICIAL NOMINATION STATISTICS AND ANALYSIS: U.S. CIRCUIT AND DISTRICT COURTS, 1977-2022, 33–38 (2023), <https://crsreports.congress.gov/product/pdf/R/R45622/7> [<https://perma.cc/FL2L-4BPT>]; RICHARD S. BETH ET AL., CONG. RSCH. SERV., CLOTURE ATTEMPTS ON NOMINATIONS: DATA AND HISTORICAL DEVELOPMENT THROUGH NOVEMBER 20, 2013, 6–10 (2018), <https://crsreports.congress.gov/product/pdf/RL/RL32878> [<https://perma.cc/Y9EW-Y3TS>].

²⁶ Tobias, *Regular Order*, *supra* note 22, at 13. GOP refusal to process Obama Supreme Court nominee Merrick Garland exemplifies this. See Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089 (2017).

²⁷ Chair Durbin retains some mechanisms which Republicans deployed, so that each party applies similar measures. Instructive is the blue slip "circuit exception." *E.g.*, *Hearing*, *supra* note 7; sources cited *infra* notes 32, 44. A compelling recent example of GOP recalcitrance came a day after Trump was convicted on thirty-plus felony counts. Nearly one-third of the GOP Caucus deployed X to post a "Dear Colleague" Letter on Senate stationery. It declared: because the White House has mocked the "rule of law and fundamentally altered our politics in un-American ways. . . . we are unwilling to aid and abet this White House in its project to tear this country apart. To that end, we will not . . . vote to confirm this administration's political and judicial appointees." Mike Lee (@SenMikeLee), X (May 31, 2024, 12:52 PM), <https://x.com/SenMikeLee/status/17966600766691672394> [<https://perma.cc/ELR3-2GJU>]. Those who pledged the next week are Tommy Tuberville (AL), Marco Rubio (FL), Rick Scott (FL), Joni Ernst (IA), Roger Marshall (KA), Rand Paul (KY), Josh Hawley (MO), Eric Schmitt (MO), Steve Daines (MT), J. D. Vance (OH), Marsha Blackburn (TN), Bill Hagerty (TN), Mike Lee (UT), and Ron Johnson (WI). Carl Hulse, *Far-Right Vows to Tie Up the Senate to Avenge Trump Are So Far Mostly Empty*, N.Y. TIMES (June 5, 2024), <https://www.nytimes.com/2024/06/05/us/politics/trump-senate-republicans.html> [<https://perma.cc/UA2G-VSK4>].

III. JUDICIAL SELECTION IN THE BIDEN ADMINISTRATION

A. Democrats' Success in Blue States

Biden and senators, particularly Majority Leader Schumer and Judiciary Committee Chair Durbin, have plainly realized much dramatic success recounted earlier by distinctly revitalizing and improving the nomination and confirmation processes. The White House assertively consults Democratic *and* GOP senators from jurisdictions that experience court vacancies, urging the politicians to robustly solicit applications, conduct interviews, plus suggest excellent, moderate, and diverse prospects for Biden's consideration.²⁸ This administration flexibly cultivates senators to agree on the finest choices whom Biden then nominates.²⁹ He also pursues rigorous, speedy Federal Bureau of Investigation background checks plus similar diligent, professional American Bar Association (ABA) candidate evaluations and ratings.³⁰ Many of Biden's impressive nominees deftly secured well-qualified rankings, which presently constitute the ABA's highest standard.³¹

Durbin and GOP Senator Lindsey Graham (SC)—who is a former Judiciary Committee Chair and Ranking Member—frequently play constructive roles at this stage.³² The Chair actively coordinates with, plus encourages, home state politicians to discover and suggest individuals who could prove acceptable for the Biden White House.³³ Examples were certain nominees whom Indiana Republican Senators Todd Young and Mike Braun purportedly sent plus the White House named.³⁴ Moreover, Durbin cooperates with Graham, who assiduously encourages his Republican Caucus and panel colleagues to collaborate with, and defer somewhat to, the chief executive because Graham argues that “elections have consequences” and reminds Democratic and Republican colleagues that district blue slips protect senatorial appointments prerogatives.³⁵

The White House then cooperates with the Senate and particular legislators to robustly, swiftly, and fairly consider all nominees.³⁶ Chair Durbin assumes much responsibility for ensuring

²⁸ See, e.g., Tobias, *supra* note 3, at 84.

²⁹ See *Durbin Delivers Opening Statement During Judiciary Committee Hearing on Six Judicial Nominations*, U.S. SENATE COMM. ON JUDICIARY (Nov. 29, 2023), <https://www.judiciary.senate.gov/press/releases/durbin-delivers-opening-statement-during-judiciary-committee-hearing-on-six-judicial-nominations> [https://perma.cc/8NE4-LJYC].

³⁰ See, e.g., *Ratings of Article III and Article IV Judicial Nominees, 117th Congress*, ABA, https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/webratingchart-117.pdf [https://perma.cc/VK38-FS7L]; *Ratings of Article III and Article IV Judicial Nominees, 118th Congress*, ABA, https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/fjc-chart-118th-congress-jan-2024.pdf [https://perma.cc/SC3Y-DPQP]. See generally Tobias, *supra* note 3, at 74–75, 85–86.

³¹ The Obama/Biden Administration and the Biden Administration thus far refused to nominate any judicial candidate whom the American Bar Association rated not qualified. Trump nominated ten candidates whom the ABA rated not qualified, and the Senate, which the Republican Party led, swiftly and overwhelmingly confirmed eight. See sources cited *supra* note 30.

³² See, e.g., statements of Sens. Durbin and Graham in *Hearing, supra* note 7; *Hearings on Nominees Before the S. Judiciary Comm.*, 118th Cong. (Jan. 25, 2023); *Hearings on Nominees Before the S. Judiciary Comm.*, 118th Cong. (Feb. 8, 2024); *Executive Business Meeting Before the S. Judiciary Comm.*, 118th Cong. (Jan. 26, 2023). Durbin and Graham created this dynamic throughout many hearings and executive business meetings since the Biden Administration's inception.

³³ See *Durbin Delivers Opening Statement During Judiciary Committee Hearing on Six Judicial Nominations, supra* note 29 and accompanying text.

³⁴ See, e.g., *supra* note 32; *infra* notes 69–81 and accompanying text.

³⁵ See, e.g., statements of Sen. Graham in sources cited *supra* note 32; *infra* notes 48, 52 and accompanying text.

³⁶ See *supra* note 32.

that the chamber does rigorously, speedily, and equitably canvass nominees.³⁷ Both parties' staff members thoroughly and consistently probe nominees and schedule hearings, which Durbin convenes twice each month that the chamber works.³⁸ Panelists query nominees using five-minute rounds.³⁹ In seven days, politicians submit questions for the record that nominees answer.⁴⁰ A few weeks later, members discuss nominee candidacies and vote.⁴¹ Choices the panel reports move next to the floor, have cloture ballots, and confirmation debates and votes, which the GOP mandates for virtually every nominee.⁴² This canvass, except for the immediately preceding sentence, portrays how selection traditionally operated, particularly before the Trump regime, and has performed over Biden's tenure, especially in states that a pair of Democratic senators represent.⁴³

B. *Red State Difficulties*

However, different circumstances pertain to numerous states with two GOP senators, who allow many vacancies to remain open during Biden's presidency for many different reasons. Most crucial are blue slips that preserve the selection predilections of home state officers whose party lacks the White House by empowering the officials to veto nominees who could assume their states' judgeships.⁴⁴ In comparison, when empty posts occur in jurisdictions whose senators are members of the chief executive's party, smooth nominations and confirmations usually do happen.⁴⁵ Additional indicia that explain the prevalence of red state vacant positions can be increasing polarization, stunning partisanship with striking paybacks, and enhanced dependence on lock-step voting for committee approval plus Senate floor cloture and confirmation ballots.⁴⁶

C. *Recent Red State Successes in Reverse Chronological Order*

Promising recent developments reveal that Biden and the Senate may fill a large percentage of the sixty-plus then-current and future circuit and district red state openings *without* nominees that persisted in January 2023.⁴⁷ For example, in December 2023, highly experienced Northern District of Texas Magistrate Judge Irma Carrillo Ramirez won decidedly powerful approval to a

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See, e.g., *U.S. Senate Roll Call Votes*, 118th Cong., 1st Sess. (2023).

⁴³ See Carl Tobias, *Senator Chuck Grassley and Judicial Confirmations*, 104 IOWA L. REV. ONLINE 31, 62 (2019).

⁴⁴ See *supra* note 18 and accompanying text. In 2017, the Republican majority decided to create a "circuit exception" to blue slips that lacked persuasive substantiation, which Democrats correspondingly retain, so that as Chair Durbin frequently admonishes the same rules will govern Republicans and Democrats. Tobias, *supra* note 43, at 54–55; Tobias, *Keep*, *supra* note 2, at 211–12.

⁴⁵ For Presidents Trump and Biden, this dynamic has saved resources, but it has meant that each almost exclusively filled vacancies first in red or blue states. *Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2017–2024).

⁴⁶ See Tobias, *supra* note 43, at 32, 58.

⁴⁷ See *Archive of Judicial Vacancies*, *supra* note 3; *Current Vacancies*, *supra* note 12.

Fifth Circuit vacancy that had been open for almost two years.⁴⁸ Texas Senators John Cornyn and Ted Cruz previously requested that a Texas Federal Judicial Evaluation Committee solicit applications, interview candidates, and provide strong people for their consideration, and this group deemed Ramirez the best.⁴⁹ Thus, the senators dutifully collaborated with Biden to recommend the jurist,⁵⁰ and following consultation, the President duly named the exceptional individual on April 17.⁵¹ Ramirez earned a promptly set panel hearing four weeks later that proceeded smoothly⁵² with rigorous, supportive June discussion of her preeminent candidacy and a rare voice vote approval.⁵³

In December, the committee also closely surveyed plus approved experienced, centrist lawyers Sara Hill and John Russell for Northern District of Oklahoma vacancies⁵⁴ that had remained open longer than a year.⁵⁵ Home state GOP Senators James Lankford and Markwayne Mullin coordinated with Biden to recommend both aspirants whom the President carefully designated on October 24.⁵⁶ In a November 15 hearing, members asked Russell a few direct queries to which he could easily respond.⁵⁷ Nonetheless, Senators Mike Lee (R-UT) and Thom Tillis (R-NC) contentiously pressed Hill about her Cherokee Nation Attorney General service plus tribal sovereignty, to which she deftly replied.⁵⁸ In the panel discussion of both submissions' myriad remarkable qualities, Cornyn emphasized Hill, who became Oklahoma's initial female Native

⁴⁸ *Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2023); see Carl Tobias, *Confirm Judge Irma Carrillo Ramirez to the Fifth Circuit*, 76 SMU L. REV. F. 150 (2023) (Ramirez process); 170 CONG. REC. S31 (daily ed. Jan. 9, 2024) (documenting Texas Eastern District Judge John Kazen's even quicker process).

⁴⁹ *Hearing on Nominees Before the S. Judiciary Comm.*, 118th Cong. (May 17, 2023) (statements of Sens. Cornyn and Cruz).

⁵⁰ Press Release, White House, President Biden Names Thirty-Second Round of Judicial Nominees (Apr. 14, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/14/president-biden-names-thirty-second-round-of-judicial-nominees/> [<https://perma.cc/Q373-DHG4>]; see Tobias, *supra* note 48, at 150–51; *supra* notes 48–49 and accompanying text.

⁵¹ See *supra* notes 49–50 and accompanying text.

⁵² *Hearing*, *supra* note 49; see Tobias, *supra* note 48, at 153–54.

⁵³ *Executive Business Meeting Before the S. Judiciary Comm.*, 118th Cong. (June 8, 2023); see Tobias, *supra* note 48, at 153–54. Panel and confirmation voice votes are rare because Republicans and Democrats engage in partisan lock-step voting, so only nominees whom both parties strongly favor earn them. The GOP has granted merely six Biden district court nominees and no appellate court nominees confirmation voice votes. *Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2022–2024).

⁵⁴ Hill's vote was 14-7 and Russell's was 18-3. *Executive Business Meeting Before the S. Judiciary Comm.*, 118th Cong. (Dec. 7, 2023).

⁵⁵ *Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2023).

⁵⁶ *Id.*; Press Release, White House, President Biden Names Fortieth Round of Judicial Nominees and Announces Nominees for U.S. Attorney, U.S. Marshal, and the U.S. Sentencing Commission (Oct. 18, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/18/president-biden-names-fortieth-round-of-judicial-nominees/> [<https://perma.cc/A4C6-6ZRL>]; Curtis Killman, *Nominees for Federal Judgeships in Oklahoma Announced*, TULSA WORLD (Oct. 18, 2023), https://tulsa-world.com/news/local/crime-courts/nominees-for-federal-judgeships-in-oklahoma-announced/article_9f302a76-6dc8-11ee-b6c8-03b5957f6196.html [<https://perma.cc/E3WJ-SYM3>].

⁵⁷ *Hearing on Nominees Before the S. Judiciary Comm.*, 118th Cong. (Nov. 15, 2023).

⁵⁸ *Id.* (statements of Sens. Lee and Tillis and nominee Hill); see Jacob Fischler, *U.S. Senate Republicans Question Oklahoma Judicial Nominee on Tribal Sovereignty*, OKLA. VOICE (Nov. 15, 2023, 3:34 PM), <https://oklahomavoice.com/2023/11/15/u-s-senate-republicans-question-oklahoma-judicial-nominee-on-tribal-sovereignty/> [<https://perma.cc/YAF5-JM2Q>].

American district judge.⁵⁹ Cornyn proclaimed that acute complaints were mustered regarding her, a seeming allusion to public opposition from Republican Party leaders.⁶⁰ The Texas legislator did express “concerns about whether she can treat the United States fairly in controversies with” the Oklahoma tribes, explicitly referencing the protracted history in Oklahoma and the country distinctly respecting tribes’ status and treatment.⁶¹ Cornyn announced that he planned on voting for both selections, partly deferring to colleagues Lankford and Mullin, who favored each nominee.⁶² Senators Chuck Grassley (R-IA) and Graham, who had been panel Chairs and Ranking Members, concomitantly supported Hill.⁶³ On December 19, the chamber promptly appointed her in a clear bipartisan manner and confirmed Russell by deploying a voice vote.⁶⁴

Early in November, after consulting GOP Senators Marco Rubio and Rick Scott, Biden named accomplished centrists to Florida district court vacancies; a pair had remained open since July 2022, one was empty in May 2021, plus a fourth became vacant over July 2020.⁶⁵ Three nominees had served as Magistrate Judges, who contributed ethnic and gender diversity; the fourth candidate had been a rigorous Southern District of New York prosecutor for years.⁶⁶ Following White House consultation with Graham, Biden afforded South Carolina Magistrate Judge Jacquelyn Austin, who had robustly presided over hundreds of cases for a decade.⁶⁷ In late November, they enjoyed a smooth hearing, cogently answering questions; in January, the panel reported the five while the Senate confirmed Austin and, close to February’s end, the Senate promptly acted to confirm the others.⁶⁸

Over 2022, Indiana GOP Senators Young and Braun cooperated with Biden to proffer able

⁵⁹ *Executive Business Meeting Before the S. Judiciary Comm.*, 118th Cong. (Dec. 7, 2023) (statements of Sen. Cornyn).

⁶⁰ For the opposition, see Tiana Headley, *Former Tribal Lawyer’s Judicial Nomination Advances in Senate*, BLOOMBERG L. (Dec. 7, 2023, 10:34 AM), <https://news.bloomberglaw.com/us-law-week/former-tribal-lawyers-judicial-nomination-advances-in-senate> [https://perma.cc/3EHH-PSRK]; Randy Krehbiel, *State GOP in Conflict with U.S. Senators on Judicial Nomination*, TULSA WORLD (Nov. 28, 2023), https://tulsaworld.com/news/state-regional/government-politics/state-gop-in-conflict-with-u-s-senators-on-judicial-nomination/article_658c907c-8e19-11ee-a00c-93e19cfe4a2f.html [https://perma.cc/MBZ2-6FFF]. The Republican Party leaders are Governor Kevin Stitt and State Senator Nathan Dahm, the state Republican Party Chair. *Id.*

⁶¹ *See Meeting*, *supra* note 59 (statements of Sen. Cornyn).

⁶² *See supra* notes 59–60.

⁶³ *See id.*; Tobias, *supra* note 22; Tobias, *supra* note 43 (Grassley’s panel service).

⁶⁴ 169 CONG. REC. S6042 (daily ed. Dec. 19, 2023); *see* sources cited *supra* note 60.

⁶⁵ Press Release, White House, President Biden Names Forty-First Round of Judicial Nominees (Nov. 6, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/11/01/president-biden-names-forty-first-round-of-judicial-nominees/> [https://perma.cc/QZ4U-M5TF]; *Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation data for 2023); *see* Michael A. Mora, *Biden Intends to Nominate These 4 to Become the Next Florida Federal Judges*, LAW.COM (Nov. 1, 2023, 1:43 PM), <https://www.law.com/dailybusinessreview/2023/11/01/biden-intends-to-nominate-these-4-to-become-the-next-florida-federal-judges/> [https://perma.cc/C4RX-5KPR].

⁶⁶ *See supra* note 65. The three Magistrate Judges were Jacqueline Becerra and Melissa Damian for the Southern District and Julie Sneed for the Middle District; the fourth nominee was Southern District nominee David Leibowitz.

⁶⁷ The nominee provides ethnic and gender diversity. *See supra* note 65.

⁶⁸ *See Hearing on Nominees Before the S. Judiciary Comm.*, 118th Cong. (Nov. 29, 2023); *Executive Business Meeting Before the S. Judiciary Comm.*, 118th Cong. (Jan. 18, 2024); Michael A. Mora, *4 Florida Nominees for US District Judge Face Senate Judiciary Committee*, LAW.COM (Nov. 29, 2023, 2:21 PM), <https://www.law.com/dailybusinessreview/2023/11/29/4-florida-nominees-for-us-district-judge-face-senate-judiciary-committee/> [https://perma.cc/FUL3-PN6R]; 170 CONG. REC. S235 (daily ed. Jan. 24, 2024) (confirming Austin); *Archive of Judicial Vacancies*, *supra* note 3 (providing four Florida nominees’ confirmation information during 2024).

Southern District Magistrate Judge Doris Pryor for a Seventh Circuit opening, and the President named her on May 25.⁶⁹ She responsively fielded July hearing queries from panelists,⁷⁰ who seriously discussed the nominee's candidacy while reporting Pryor that August.⁷¹ Early in December, the Senate easily confirmed her.⁷² After rigorously consulting the Indiana officers, Biden proposed elevating well-qualified Southern District Magistrate Judge Matthew Brookman to a rather prolonged vacancy in December 2022.⁷³ Following a relatively placid nominee hearing⁷⁴ and an early March solicitous discussion plus a rare voice vote,⁷⁵ with a similar nominee debate plus another voice vote, the chamber appointed him.⁷⁶ Later in 2023, Biden cultivated Young and Braun, who recommended Joshua Kolar, a strong, experienced Magistrate Judge and former prosecutor, whom Biden named in July's end for a Seventh Circuit open post that had been vacant thirteen months.⁷⁷ The nominee won an uneventful hearing in early September in which

⁶⁹ Press Release, White House, President Biden Names Eighteenth Round of Judicial Nominees (May 25, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/25/president-biden-names-eighteenth-round-of-judicial-nominees/> [https://perma.cc/6W9V-3VGN]; see Rose Wagner, *Republicans Finally Offer Blue Slip for Biden Court Nominee*, COURTHOUSE NEWS SERV. (July 13, 2022), <https://www.courthousenews.com/republicans-finally-offer-blue-slip-for-biden-court-nominee/> [https://perma.cc/9C6S-SAE2].

⁷⁰ See *Hearing on Nominees Before the S. Judiciary Comm.*, 118th Cong. (July 13, 2022); see also Wagner, *supra* note 69.

⁷¹ See *Executive Business Meeting Before the S. Judiciary Comm.*, 118th Cong. (Aug. 4, 2022); see also Nimit Dixit, *U.S. Senate Panel Deadlocks in Vote to Advance 6th Circuit Judicial Nominee*, REUTERS (Aug. 4, 2022, 3:20 PM), <https://www.reuters.com/legal/government/us-senate-panel-deadlocks-vote-advance-6th-circuit-judicial-nominee-2022-08-04/> [https://perma.cc/L65D-QZWQ].

⁷² See 168 CONG. REC. S6955 (daily ed. Dec. 5, 2022); see also Johnny Magdaleno, *Doris Pryor, IU Grad, Will Be the First Black Judge from Indiana to Join Seventh Circuit*, INDIANAPOLIS STAR (Dec. 5, 2022, 7:58 PM), <https://www.indystar.com/story/news/2022/12/06/doris-pryor-indiana-grad-appointed-to-seventh-circuit/69702777007/> [https://perma.cc/RAG7-Y622].

⁷³ Press Release, White House, President Biden Names Twenty-Eighth Round of Judicial Nominees (Dec. 21, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/21/president-biden-names-twenty-eighth-round-of-judicial-nominees/> [https://perma.cc/HJ3Z-PL67]; Marilyn Odendahl, *Magistrate Judge Brookman to be Nominated to Indiana Southern District Court*, IND. LAW. (Dec. 21, 2022), <https://www.theindianalawyer.com/articles/magistrate-judge-brookman-to-be-nominated-to-indiana-southern-district-court> [https://perma.cc/H77V-L3EX].

⁷⁴ See *Hearing on Nominees Before the S. Judiciary Comm.*, 118th Cong. (Jan. 25, 2023); see also Olivia Covington, *Senate Judiciary Has Few Questions for Brookman in 1st District Court Confirmation Hearing, Signaling Likely Easy Confirmation*, IND. LAW. (Jan. 26, 2023), <https://www.theindianalawyer.com/articles/senate-judiciary-has-few-questions-for-brookman-in-1st-district-court-confirmation-hearing> [https://perma.cc/58KR-YWUV].

⁷⁵ See *Executive Business Meeting Before the S. Judiciary Comm.*, 118th Cong. (Mar. 9, 2023); see also Daniel Carson, *Senate Judiciary Committee Approves Brookman Nomination, with Confirmation Vote Expected Soon*, IND. LAW. (Mar. 9, 2023), <https://www.theindianalawyer.com/articles/senate-judiciary-committee-approves-brookman-nomination-with-confirmation-vote-expected-soon> [https://perma.cc/J6VC-2M6F].

⁷⁶ 169 CONG. REC. S1060 (daily ed. Mar. 29, 2023); see Nate Raymond, *Senate Confirms Rare Biden Judge Pick from Republican-Led State*, REUTERS (Mar. 30, 2023, 12:07 PM), <https://www.reuters.com/legal/government/senate-confirms-rare-biden-judge-pick-republican-led-state-2023-03-30/> [https://perma.cc/M2J2-2C8U].

⁷⁷ Press Release, White House, President Biden Names Thirty-Sixth Round of Judicial Nominees (July 27, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/27/president-biden-names-thirty-sixth-round-of-judicial-nominees/> [https://perma.cc/X3AG-54AL]; see Nate Raymond, *Biden Nominates 2 US Navy Reserve Officers to Federal Appeals Courts*, REUTERS (July 27, 2023, 12:12 PM), <https://www.reuters.com/legal/government/biden-nominates-2-us-navy-reserve-officers-federal-appeals-courts-2023-07-27/> [https://perma.cc/SQ5X-QGMN].

Kolar thoroughly and carefully replied to GOP politicians' questions,⁷⁸ earned a smooth discussion plus a solid panel report later that month, and secured January confirmation.⁷⁹ In November, after consulting Young and Braun, the chief executive proffered able, mainstream Indiana state Judges Cristal Brisco and Gretchen Lund, who furnish experiential plus gender diversity for two court openings that remained in the Northern District; one was empty in January 2021, and the second opened in July 2022.⁸⁰ Their year-end hearing proceeded smoothly, purportedly because GOP members prioritized questioning regarding two appellate court nominees; therefore, Brisco and Lund received comparatively truncated January committee discussions and favorable votes plus confirmations.⁸¹

Following Biden's apparent consultation about a protracted Kansas appeals court vacancy with GOP Senators Jerry Moran and Roger Marshall, Biden named well-qualified Federal Public Defender Richard Federico to the Tenth Circuit in late July 2023.⁸² The Senate linked the aspirant with Kolar across the confirmation process, which may explain why Federico had a subdued hearing.⁸³ However, the Republican senators did probe a few of the nominee's sentencing guideline recommendations.⁸⁴ He then experienced a productive late September discussion plus a

⁷⁸ See *Hearing on Nominees Before the S. Judiciary Comm.*, 118th Cong. (Sept. 6, 2023); see also Daniel Carson, *Kolar Fields 1st Questions from Senate Judiciary Committee as 7th Circuit Nominee*, IND. LAW. (Sept. 7, 2023), <https://www.theindianalawyer.com/articles/kolar-fields-1st-questions-from-senate-judiciary-committee-as-7th-circuit-nominee/> [<https://perma.cc/5Q76-7Q65>].

⁷⁹ See *Executive Business Meeting Before the S. Judiciary Comm.*, 118th Cong. (Sept. 28, 2023); see also *Executive Business Meeting*, *supra* note 68 (reapproving Kolar, whom the GOP returned to the White House on December 20, 2023); 170 CONG. REC. S283 (daily ed. Jan. 30, 2024).

⁸⁰ Press Release, White House, President Biden Names Forty-Second Round of Judicial Nominees (Nov. 15, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/11/15/president-biden-names-forty-second-round-of-judicial-nominees/> [<https://perma.cc/Q3MC-W3KH>]; see *Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2023); Avalon Zoppo, *Biden Announces 3rd, 4th Circuit Picks*, LAW.COM (Nov. 15, 2023, 11:05 AM), <https://www.law.com/nationallawjournal/2023/11/15/biden-announces-3rd-4th-circuit-picks/> [<https://perma.cc/37UB-NGRT>].

⁸¹ See *Hearing on Nominees Before the S. Judiciary Comm.*, 118th Cong. (Dec. 13, 2023); *Executive Business Meeting*, *supra* note 68 (discussions and votes); Tiana Headley, *Judiciary Republicans Prod Muslim Circuit Pick on Terrorism*, BLOOMBERG L. (Dec. 13, 2023, 3:22 PM), <https://news.bloomberglaw.com/us-law-week/judiciary-republicans-prod-muslim-appellate-nominee-on-terrorism> [<https://perma.cc/A372-PX4J>]; Rachel Weiner, *Republicans Grill 4th Circuit Nominee on Justice Kavanaugh, 'Right to Work'*, WASH. POST (Dec. 13, 2023, 6:27 PM), <https://www.washingtonpost.com/dc-md-va/2023/12/13/nicole-berner-senate-confirmation/> [<https://perma.cc/BC2T-ADWL>]; 170 CONG. REC. S236 (daily ed. Jan. 24, 2024) (confirming Brisco); 170 CONG. REC. S260 (daily ed. Jan. 25, 2024) (confirming Lund).

⁸² See *supra* note 77; see also *Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2023). Biden first named federal prosecutor Jabari Wamble, yet this nomination became controversial, and he withdrew. See Daniel Desrochers, *Biden Once Again Nominates Cleaver's Son-in-Law to Federal Bench. This Time for a Lower Court*, KAN. CITY STAR (Feb. 22, 2023, 11:41 AM), <https://www.kansascity.com/news/politics-government/article272570240.html> [<https://perma.cc/5DHB-GEKF>].

⁸³ See *supra* notes 77–79 and accompanying text (describing Kolar's confirmation process).

⁸⁴ See *Hearing*, *supra* note 78. The GOP senators appeared to intimate that Federico had been soft on crime when representing defendants. Daniel Desrochers, *Josh Hawley Claims Judicial Nominee Too Soft on Crime Because of Work on Child Porn Case*, KAN. CITY STAR (Sept. 6, 2023, 4:43 PM), <https://www.kansascity.com/news/politics-government/article279020769.html> [<https://perma.cc/4ER3-7WHD>].

report.⁸⁵ Federico also smoothly earned confirmation in December, and the Kansas politicians voted yes.⁸⁶

After cultivating amenable Louisiana Republican Senators Bill Cassidy and John Kennedy, Biden named astute Eastern District Magistrate Judge Dana Douglas in June 2022 to a Fifth Circuit open position.⁸⁷ She enjoyed an uneventful, nuanced July hearing⁸⁸ plus a September panel report.⁸⁹ The chamber appointed her on a superb December ballot.⁹⁰ Following consultation, Biden tendered revered litigator Darrel Papillion for the Eastern District last March.⁹¹ The senators notably lauded his remarkable career during the April hearing;⁹² Kennedy reiterated this praise in a May committee discussion and report.⁹³ The nominee won the May 30 confirmation.⁹⁴ After consultation, the White House named Brandon Long for the Eastern District and, in turn, Jerry

⁸⁵ See *supra* note 79.

⁸⁶ 169 CONG. REC. S5894 (daily ed. Dec. 11, 2023); see Jason Alatidd, *Senate Confirms Joe Biden Pick of Federal Public Defender from Kansas to Join 10th Circuit*, TOPEKA CAP. J. (Dec. 14, 2023), <https://www.cjonline.com/story/news/politics/government/2023/12/14/senate-confirms-biden-nominee-richard-federico-kansas-10th-circuit-judge/71891273007/> [<https://perma.cc/4DH9-SSSV>].

⁸⁷ Press Release, White House, President Biden Names Nineteenth Round of Judicial Nominees (June 15, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/president-biden-names-nineteenth-round-of-judicial-nominees/> [<https://perma.cc/67RW-9ENT>]; John Simerman, *Biden Nominates Dana Douglas, Magistrate in New Orleans, for U.S. 5th Circuit Appeals Court*, NOLA.COM (June 15, 2022), https://www.nola.com/news/politics/biden-nominates-dana-douglas-magistrate-in-new-orleans-for-u-s-5th-circuit-appeals-court/article_f5f51d88-ec84-11ec-a9f9-970fc6c68a45.html [<https://perma.cc/X2SR-FAVU>].

⁸⁸ See *Hearing on Nominees Before the S. Judiciary Comm.*, 117th Cong. (July 27, 2022); Mark Ballard, *Dana Douglas Receives Confirmation Hearing for 5th U.S. Circuit Court of Appeals*, ADVOCATE (July 27, 2022), https://www.theadvocate.com/baton_rouge/news/politics/dana-douglas-receives-confirmation-hearing-for-5th-u-s-circuit-court-of-appeals/article_932224ec-0dd3-11ed-b2f1-cfcbb9713ef2.html [<https://perma.cc/XY72-GNMM>].

⁸⁹ *Executive Business Meeting Before the S. Judiciary Comm.*, 117th Cong. (Sept. 15, 2022).

⁹⁰ 168 CONG. REC. S7114 (daily ed. Dec. 13, 2022); see Seth Stern, *First Black Woman Confirmed to Fifth Circuit by Senate*, BLOOMBERG L. (Dec. 13, 2022, 2:17 PM), <https://news.bloomberglaw.com/us-law-week/louisiana-magistrate-judge-douglas-confirmed-to-fifth-circuit> [<https://perma.cc/K9S8-DL3E>].

⁹¹ See Press Release, White House, President Biden Names Thirty-First Round of Judicial Nominees and Announces New Nominees to Serve as U.S. Attorney (Mar. 20, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/20/president-biden-names-thirty-first-round-of-judicial-nominees/> [<https://perma.cc/FLB2-BUBZ>]; see also Mark Ballard, *Joe Biden Taps Baton Rouge Trial Lawyer Darrel Papillion to New Orleans Federal Court*, NOLA.COM (Mar. 20, 2023), https://www.nola.com/news/politics/president-taps-baton-rouge-trial-lawyer-to-new-orleans-court/article_ae8a1376-c754-11ed-8f1f-b74a4c1c1dbb.html [<https://perma.cc/3R5B-DU5L>].

⁹² See *Hearing on Nominees Before the S. Judiciary Comm.*, 118th Cong. (Apr. 18, 2023). *But see* Mark Ballard, *New Orleans Judicial Nominee Grilled on Tony Spell Prosecution*, NOLA.COM (Apr. 18, 2023), https://www.nola.com/news/politics/orleans-judicial-nominee-grilled-on-tony-spell-prosecution/article_20e4e55c-de18-11ed-86ed-5f1db9c1b47f.html [<https://perma.cc/8R2F-HTML>].

⁹³ See *Executive Business Meeting Before the S. Judiciary Comm.*, 118th Cong. (May 11, 2023); see also Mark Ballard, *U.S. Senate to Vote on Darrel Papillion's Confirmation to New Orleans Federal Bench*, NOLA.COM (May 11, 2023), https://www.nola.com/news/politics/judiciary-panel-advances-darrel-papillion-to-confirmation/article_0991a3b6-ea7c-11ed-b445-e7fc3be7d2d3.html [<https://perma.cc/A2Z5-76CR>].

⁹⁴ See 169 CONG. REC. S1783 (daily ed. May 30, 2023); see also Mark Ballard, *Senate Confirms Baton Rouge Lawyer Darrel Papillion for New Orleans Federal Court*, NOLA.COM (May 30, 2023), https://www.nola.com/news/senate-confirms-darrel-papillion-to-neworleans-federal-court/article_991d5c7a-ff1a-11ed-9e57-43385baf2d99.html [<https://perma.cc/K3FF-2P9U>].

Edwards for the Western District in early June.⁹⁵ Both realized a calm July hearing⁹⁶ and enjoyed panel discussions with reports in September.⁹⁷ Twelve weeks later, they had analogous confirmation votes.⁹⁸

Following active cultivation about one Idaho district court vacancy with GOP Senators Mike Crapo and Jim Risch, Biden named state judge Amanda Brailsford in January 2023.⁹⁹ The panel granted her a solicitous March hearing, principally because she is highly experienced and the senators favored her.¹⁰⁰ The next month, the committee reported the nominee with a prompt voice vote, and in early May, the Senate confirmed her.¹⁰¹

On December 19, Biden mustered the last 2023 package that included talented nominees for red state vacant posts.¹⁰² Three had been Magistrate Judges, another was a state court jurist, and the fifth served as a highly competent federal prosecutor.¹⁰³ Avid consultation—which suggested a pair of Texas district submissions, one each in Nebraska, Utah, and Wyoming—plus a smooth committee hearing, compelling panel reports, and confirmation votes seemingly mean that Biden and the chamber will dutifully fill plentiful numbers of empty slots that plague red states

⁹⁵ See Press Release, White House, President Biden Names Thirty-Fourth Round of Judicial Nominees and One New Nominee to Serve as U.S. Attorney (June 7, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/07/president-biden-names-thirty-fourth-round-of-judicial-nominees/> [https://perma.cc/8C54-528X]. But see Mark Ballard, *Joe Biden Taps 2 to Fill Vacancies on Louisiana's U.S. District Courts - and Is Blasted*, NOLA.COM (June 7, 2023), <https://www.nola.com/news/politics/joe-biden-taps-2-to-fill-vacancies-on-louisianas-u-s-district-courts--/article41ea13a-052e-11ee-8dd4-6b7da0bbfe18.html> [https://perma.cc/FJT8-PR66] (recounting how some Louisiana U.S. Representatives claimed that the Biden Administration had not consulted the elected officials).

⁹⁶ See *Hearing on Nominees Before the S. Judiciary Comm.*, 118th Cong. (July 12, 2023). But see Mark Ballard, *Federal Judge Nominee for New Orleans Quizzed About Hunter Biden's Laptop*, NOLA.COM (July 12, 2023), https://www.nola.com/news/politics/new-orleans-nominee-quizzed-about-hunter-bidens-laptop/article_2902908e-20f0-11ee-a1f8-db80caaa86dd.html [https://perma.cc/437Z-N7HG].

⁹⁷ See *Executive Business Meeting Before the S. Judiciary Comm.*, 118th Cong. (Sept. 14, 2023); see also Mark Ballard, *Senate Panel Recommends Approval of Judges for Federal Courts in New Orleans, Alexandria*, NOLA.COM (Sept. 14, 2023), https://www.nola.com/news/politics/senate-panel-oks-federal-judges-in-new-orleans-alexandria/article_e4fcd000-5300-11ee-b73a-2b7785ad2333.html [https://perma.cc/BZ24-R23U].

⁹⁸ See 169 CONG. REC. S5986–87 (daily ed. Dec. 14, 2023) (reporting that Edwards' vote was 66-24 and Long's ballot was 64-22); see also Mark Ballard, *U.S. Senate Confirms Two New Federal Judges to Louisiana Bench*, NOLA.COM (Dec. 14, 2023), https://www.nola.com/news/politics/national_politics/us-senate-confirms-two-new-federal-judges-to-louisiana-bench/article_e7ac0cbc-9ac2-11ee-8b7e-47b6d930aff9.html [https://perma.cc/5NED-NPAG].

⁹⁹ See Press Release, White House, President Biden Names Twenty-Ninth Round of Judicial Nominees (Jan. 18, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/18/president-biden-names-twenty-ninth-round-of-judicial-nominees/> [https://perma.cc/U5Y8-3UX3]; see also Maegan Vazquez, *Biden Releases First Slate of 2023 Judicial Nominees*, CNN (Jan. 18, 2023, 4:02 PM), <https://www.cnn.com/2023/01/18/politics/biden-judicial-nominees-2023/index.html> [https://perma.cc/H4AU-76GE].

¹⁰⁰ Both senators glowingly introduced her. See *Hearing on Nominees Before the S. Judiciary Comm.*, 118th Cong. (Mar. 22, 2023).

¹⁰¹ *Executive Business Meeting Before the S. Judiciary Comm.*, 118th Cong. (Apr. 27, 2023); 169 CONG. REC. S1549 (daily ed. May 4, 2023).

¹⁰² See Press Release, White House, President Biden Names Forty-Third Round of Judicial Nominees (Dec. 19, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/12/19/president-biden-names-forty-third-round-of-judicial-nominees/> [https://perma.cc/8EQC-XY7C]; see also Tiana Headley, *Biden to Nominate Five Red State Trial Court Picks*, BLOOMBERG L. (Dec. 19, 2023, 8:01 AM), <https://news.bloomberglaw.com/us-law-week/biden-to-nominate-five-red-state-trial-court-judge-picks> [https://perma.cc/9LLQ-R7H8].

¹⁰³ Headley, *supra* note 102. The Magistrate Judges are Texas' Leon Schydlower, Nebraska's Susan Bazis, and Wyoming's Kelly Rankin. *Id.* The state judge is Utah's Ann Marie McIff Allen. *Id.* The prosecutor is Texas' Ernesto Gonzalez. *Id.* GOP senators seem to favor these nominees, whose experience resembles district judges' work. See 28 U.S.C. §§ 631–639 (2018).

during 2024.¹⁰⁴ Part IV scrutinizes issues that the President and both parties' senators can face to achieve this commendable goal.

IV. CHALLENGES TO FILLING RED STATE VACANCIES

The prospects of many red state nominations and confirmations are promising, indicating that the chief executive, as well as Democratic and Republican legislators, could make 2024 progress with openings across states that presently lack nominees. However, it currently seems unclear whether the President and the Senate will meaningfully close existing and future court vacancies this year.

First, twenty-three present and five future district openings in red states currently remain without nominees.¹⁰⁵ Certain positions have been very difficult to fill, and other empty judgeships will certainly arise in 2024. Second, the plentiful recent GOP collaboration will likely subside, especially once Biden and the chamber move deeper into the election year when the appointments process conventionally slows and then abruptly halts.¹⁰⁶ Third, even in red states where the chief executive and GOP officials earned success when naming or approving fine moderate designees, vacancies without or possessing nominees remain. For instance, Texas still confronts five present and one future empty seats, Indiana has a lone current open post, Florida addresses three current and one future vacancy, Kansas and South Carolina treat a present open slot, and Louisiana attacks three current unfilled positions.¹⁰⁷

¹⁰⁴ *Hearing on Nominees Before the S. Judiciary Comm.*, 118th Cong. (Jan. 24, 2024). The nominees find both parties' sweet spot, as do Biden's first package of 2024 picks, who had a similar hearing, and his second 2024 package. *See Hearing on Nominees Before the S. Judiciary Comm.*, 118th Cong. (Feb. 8, 2024); *Executive Business Meeting Before the S. Judiciary Comm.*, 118th Cong. (Feb. 29, 2024); Press Release, White House, President Biden Names Forty-Fourth Round of Judicial Nominees (Jan. 10, 2024), <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/01/10/president-biden-names-forty-fourth-round-of-judicial-nominees/> [<https://perma.cc/9LDK-8C6D>]; Press Release, White House, President Biden Names Forty-Fifth Round of Judicial Nominees and One New Nominee to Serve as U.S. Marshal (Feb. 7, 2024), <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/02/07/president-biden-names-forty-fifth-round-of-judicial-nominees/> [<https://perma.cc/V9GZ-RVED>]; *see also Archive of Judicial Vacancies*, *supra* note 3 (providing Nebraska, Texas, Utah, and Wyoming nominees' confirmation information during 2024).

¹⁰⁵ *Current Judicial Vacancies and Future Judicial Vacancies*, *supra* note 12.

¹⁰⁶ This did not materialize in either the Trump Administration or the Biden Administration. Trump confirmed fourteen lower court judges in 2020 *after* he lost, and Biden seated thirteen in the 2022 lame duck session. *Archive of Judicial Vacancies*, *supra* note 3 (providing confirmation information during 2020 and 2022); *see* Carl Tobias, *Selecting District Judges in the 116th Senate Lame Duck Session*, YALE J. ON REG. NOTICE & COMMENT (Dec. 4, 2020), <https://www.yalejreg.com/nc/selecting-district-judges-in-the-116th-senate-lame-duck-session-by-carl-tobias/> [<https://perma.cc/LSY2-QSQ7>]; *see also* Carl Tobias, *Filling Lower Court Vacancies in Congress' Lame Duck Session*, 57 U. RICH. L. REV. ONLINE 47 (2022).

¹⁰⁷ *Current Judicial Vacancies and Future Judicial Vacancies*, *supra* note 12 (Texas has two, and Florida three, emergencies). Cornyn frequently asserts that he and Cruz help Biden fill Texas vacancies and two recently confirmed Western District of Texas judges substantiate this, although six district court vacancies remain without nominees in Texas. *See* Ryan Tarinelli, *Sen. John Cornyn Blames White House for Some Judicial Vacancies*, ROLL CALL (Jan. 26, 2023, 2:29 PM), <https://rollcall.com/2023/01/26/sen-john-cornyn-blames-white-house-for-some-judicial-vacancies/> [<https://perma.cc/V4EV-JNMY>]; *Current Judicial Vacancies and Future Judicial Vacancies*, *supra* note 12. Moreover, the other five states' senators helped Biden fill their vacant seats. *See, e.g., Meetings*, *supra* note 53; *Hearings*, *supra* notes 49, 68; *see supra* notes 101–04. The blue states include California, which has five present, and two future, vacancies, New York which faces two current, and two future, openings, Pennsylvania which confronts four current, and one future, vacancies, Connecticut, Illinois, Maryland, Minnesota, Oregon, and

Federal court observers must not forget that many red state politicians afforded little help when Biden sought to nominate in his tenure,¹⁰⁸ despite having multiple or protracted unoccupied seats with or lacking nominees, certain seats of which remain emergencies. For instance, Missouri has three present and one future empty district court slots.¹⁰⁹ Alabama faces two current openings, North Carolina treats one present and two future vacant court seats, and Alaska counters two current empty slots.¹¹⁰ Arkansas, Mississippi, and Tennessee face one present opening.¹¹¹ Regarding appellate courts, New Jersey must fill one current vacancy for which Biden has marshaled a nominee; Florida, Maine, and North Carolina have one future open court seat, and Tennessee confronts two for all of which Biden has mustered nominees; and Delaware combats a future empty slot that lacks a nominee.¹¹² Thus, Part V surveys how Biden, as well as Republican and Democratic senators, might directly close numerous red state vacancies across 2024.

V. SUGGESTIONS FOR FELICITOUSLY FILLING RED STATE VACANCIES

Those parameters show that Biden, White House Counsel officers with practical responsibility for appointments, committee members and staff, and senators, especially in jurisdictions that have openings without nominees, can evaluate meritorious, nuanced approaches that deserve consideration. Biden and White House personnel must redouble their daunting

Washington, which have one current vacancy, as well as Georgia, Massachusetts, New Mexico, and Vermont, which confront one future opening. *Current Judicial Vacancies and Future Judicial Vacancies*, *supra* note 12. The jurisdictions with split delegations include Arizona, which counters one future opening, Montana that experiences a future vacancy to which Biden has named Danna Jackson on whom Daines has refused to return his blue slip, Ohio, which faces one current, and one future, vacancy, as well as Maine and Wisconsin, each of which has one future vacancy. *Current Judicial Vacancies and Future Judicial Vacancies*, *supra* note 12; *see supra* note 9 (discussing Jackson and Daines). The District of Columbia addresses two current openings. *Current Judicial Vacancies*, *supra* note 12.

¹⁰⁸ *See* Part III.B.

¹⁰⁹ *Current Judicial Vacancies and Future Judicial Vacancies*, *supra* note 12; *see* Julia Coin, *As NC Federal Court Vacancies Drag On, Tillis and Budd Show No Sign of Interest*, NEWS & OBSERVER (June 28, 2024), <https://www.msn.com/en-us/news/us/as-nc-federal-court-vacancies-drag-on-tillis-and-budd-show-no-sign-of-interest/ar-BB1p35DP> [<https://perma.cc/3ZYZ-6QLW>]; Michael Gordon, *U.S. Courts of Western NC Have Had Only White Male Judges for 150 Years. Is That Changing?*, CHARLOTTE OBSERVER (Apr. 13, 2022, 4:27 PM), <https://www.charlotteobserver.com/news/local/article260343265.html> [<https://perma.cc/3SGR-KSK9>]; Daniel Desrochers, *Hawley, Schmitt Have Opposed Most Biden Judicial Nominees. Can They Agree on MO Judges?*, KAN. CITY STAR (May 9, 2024), <https://www.yahoo.com/news/hawley-schmitt-opposed-most-biden-155900582.html?> [<https://perma.cc/JC67-CZZL>]; Carl Tobias, *Josh Hawley and Eric Schmitt, You Owe It to Missouri to Confirm Federal Court Nominees*, KAN. CITY STAR (Jan. 2, 2024, 5:02 AM), <https://www.kansascity.com/opinion/readers-opinion/guest-commentary/article283600633.html> [<https://perma.cc/K75T-XGL5>].

¹¹⁰ *See* sources cited *supra* note 109; *see also* Tobi Raji, *Trump-Appointed Judge in Alaska Resigns Over Sexual Misconduct*, WASH. POST (July 8, 2024), <https://www.washingtonpost.com/national-security/2024/07/08/alaska-judge-joshua-kindred-resign-misconduct/> [<https://perma.cc/5EHD-3JXK>]; Mattathias Schwartz, *Federal Judge in Alaska Resigns Amid Accusations of Sexual Harassment*, N.Y. TIMES (July 9, 2024), <https://www.nytimes.com/2024/07/09/us/federal-judge-alaska-sexual-harassment.html?smid=em-share> [<https://perma.cc/92QK-95EQ>].

¹¹¹ *See* sources cited *supra* note 109.

¹¹² Biden recently nominated North Carolina Solicitor General Ryan Park to the North Carolina vacancy. Press Release, White House, President Biden Names Fifty-Second Round of Judicial Nominees (July 3, 2024), <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/07/03/president-biden-names-fifty-second-round-of-judicial-nominees/> [<https://perma.cc/5358-YYSP>]; Lucy Marques, *Biden Picks NC Solicitor General as Nominee for 4th Circuit Appeals Court Vacancy*, CHARLOTTE OBSERVER (July 3, 2024), <https://www.charlotteobserver.com/news/politics-government/article289711714.html> [<https://perma.cc/X6TE-5WTA>]; *Current Judicial Vacancies and Future Judicial Vacancies*, *supra* note 12; *see* sources cited *supra* note 109.

initiatives that could fill all red state trial court vacancies during 2024. The President and executive officials need to rigorously consult and cultivate home-state politicians and be comparatively flexible. Illustrative are jurisdictions with multiple court openings. Biden and the White House staff can envision (1) Democrats proposing one nominee and the GOP choosing a second, as could have occurred with recent Indiana, Louisiana, and Oklahoma picks,¹¹³ or (2) compromising somewhat on types of experience by proffering more nominees who are U.S. Magistrate Judges, state court jurists, or federal or state prosecutors, as may have been true for several Indiana and Louisiana circuit and trial court judges, plus the November 6 election, the 2023 year's end, and 2024 packages.¹¹⁴

Chair Durbin and Ranking Member Graham, specifically, but in particular together, should continue and expand their productive initiatives, which encourage lawmakers in states that encounter vacancies lacking nominees to cooperate with Biden and detect plus submit well-qualified, mainstream candidates whom this administration then names. Politicians in red states whose federal courts have lengthy, or more than one, empty posts without nominees, yet may distrust Biden, ought to seek advice from colleagues who have agreed with him respecting numerous choices they found acceptable because prolonged openings could detrimentally affect the states' jurists, court personnel, and litigants. GOP members should keep in mind that these effects are profound in civil suits whose participants encompass numbers of "institutional litigants," such as corporations, universities, governments, and many others with constricted resources who prefer swift disposition.¹¹⁵

Finally, Biden and the parties' legislators should conscientiously explore and institute efficacious procedures that can restrict or ameliorate the selection process's steep decline, which is characterized by ruthless polarization and striking partisanship.¹¹⁶ One stunningly effective concept that particular senators adopt is a "bipartisan judiciary."¹¹⁷ This construct allows the party that lacks the White House to suggest a percentage of candidates. The approach could be augmented with comprehensive legislation that authorizes sixty-plus new district court slots.¹¹⁸ Although politicization confounds election years, election years also constitute the most salient times for passing laws because Republicans and Democrats have no clear idea who might win the election and confirm numerous jurists. The measures, in fact, would apply once the election concludes, thus supplying neither party benefits when implemented and confining the ability to

¹¹³ See Tobias, *Keep*, *supra* note 2, at 235; see also Coin, *supra* note 109; Gordon, *supra* note 109; *supra* notes 43–53, 80–81, 94–97.

¹¹⁴ See *supra* notes 65–75, 87–90, 94–97, 101–04 and accompanying text. Numerous Republican senators appear to be more comfortable with these judges and prosecutors than, for example, counsel who defend people accused of crime.

¹¹⁵ See *supra* note 16 and accompanying text.

¹¹⁶ See *supra* notes 19–27 and accompanying text.

¹¹⁷ For more specifics regarding the history of the bipartisan judiciary and how the construct operates in practice, see Michael J. 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); Tobias, *Keep*, *supra* note 2, at 230–32.

¹¹⁸ Senator Todd Young and Senator Chris Coons (D-DE), who is a well-respected, experienced, longtime Judiciary Committee member, have collegially worked on and introduced the JUDGES Act that incorporates Judicial Conference recommendations for sixty-six new district court judgeships that the federal court policymaking arm has repeatedly premised on conservative case and workload estimates. See sources cited *supra* note 14. Congress passed the last comprehensive judgeships law in 1990. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5098.

game the system.¹¹⁹ Combining a bipartisan judiciary plus sixty-six trial-level positions would realize advantages. They may slow the confirmation and nomination processes' downward cascading and counterproductive spiral while (1) affording each party realistic incentives to cooperate, (2) appointing comparatively diverse jurists vis-à-vis ethnicity, gender, sexual orientation, ideology, plus experience, and (3) supplementing trial courts' limited judicial resources.

Another concept that observers duly proffer is admonishing circuit judges who reach sixty-five and have fifteen years of court service¹²⁰ to promptly become senior jurists, which might permit Biden to name and confirm their successors.¹²¹ That avenue may deserve criticism as unseemly, presumptuous, or even ostensibly compromising judicial independence.¹²² This year appears late to effectuate the construct, and only a few in sixteen 2023 retirement-eligible Democratic circuit appointees pursued that idea.¹²³ However, some recent precedent justifies this:¹²⁴ a number of jurists did make 2024 status changes,¹²⁵ and eight posts currently are empty, while Biden has committed to filling all 2024 vacancies.¹²⁶

Now is the moment for senators who presently represent states with openings that lack nominees to dutifully place excellent centrists in those seats. The politicians should acutely coordinate with the administration through receptivity to executive consultation and comprehensively denominating, interviewing, and recommending prospects whom Biden concomitantly designates after robustly cultivating home-state officers. The legislators must also

¹¹⁹ I rely substantially in this paragraph's remainder on S. 4199, *supra* note 14; see Tobias, *Keep*, *supra* note 2, at 232.

¹²⁰ 28 U.S.C. § 371 (2018) ("Rule of 80"); see David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007).

¹²¹ See Erwin Chemerinsky, *Democrats Need to Move Fast to Appoint Judges, Now More Than Ever*, N.Y. TIMES (Oct. 11, 2023), <https://www.nytimes.com/2023/10/11/opinion/biden-judges-democrats.html> [<https://perma.cc/AA8P-Y6D8>]; Ruth Marcus, *Why 70 Aging Federal Jurists Should Make Way for Younger Judges*, WASH. POST (Oct. 10, 2023, 7:15 AM), <https://www.washingtonpost.com/opinions/2023/10/10/aging-judges-senior-status-trump-biden/> [<https://perma.cc/8RP3-M9W2>].

¹²² Changing status may be the most critical decision that judges and millions of individuals must make.

¹²³ See Bendery, *supra* note 10; see also Tiana Headley, *Clinton, Obama Circuit Judges Shun Retirement as Election Looms*, BLOOMBERG L. (Jan. 10, 2024, 4:45 AM), <https://news.bloomberglaw.com/us-law-week/clinton-obama-circuit-judges-shun-retirement-as-election-looms> [<https://perma.cc/86G6-UQT8>]; Avalon Zoppo, *1st Circ. Judge Kayatta Going Senior, Allowing 'Younger Generation to Have More of a Voice'*, LAW.COM (Nov. 17, 2023, 12:32 PM), <https://www.law.com/nationallawjournal/2023/11/17/1st-circ-judge-kayatta-going-senior-allowing-younger-generation-to-have-more-of-a-voice/> [<https://perma.cc/CQ7M-SMSM>].

¹²⁴ Graham and GOP Majority Leader Mitch McConnell (R-KY) encouraged Republican Presidents' judicial appointees to assume senior status so Trump could replace them. 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> [<https://perma.cc/7PT9-335E>]; Martin Pengelly, *Top Senate Republican Urges Older Conservative Judges to Retire*, GUARDIAN (May 29, 2020, 2:08 PM), <https://www.theguardian.com/law/2020/may/29/top-senate-republican-lindsey-graham-urges-older-conservative-judges-retire> [<https://perma.cc/6DRV-MSB9>].

¹²⁵ See, e.g., Danielle Battaglia, *Reduced Role for Judge James Wynn, an NC Native, Will Let Biden Nominate a New Judge*, NEWS & OBSERVER (Jan. 9, 2024, 2:07 PM), <https://www.newsobserver.com/news/politics-government/article284019888.html> [<https://perma.cc/6PND-2Z52>]; Rosie Manins, *Biden To Fill Vacancy on Atlanta-Based Federal Appeals Court*, ATLANTA J. CONST. (Feb. 1, 2024), <https://www.ajc.com/news/atlanta-news/biden-to-fill-vacancy-on-atlanta-based-federal-appeals-court/RZYRAGC3OND7RNA3NKRZY7WZMA/> [<https://perma.cc/23N5-J7UV>]; Nate Raymond, *Rovner, First Woman Judge on 7th Circuit, To Take Senior Status*, REUTERS (Jan. 12, 2024, 4:44 PM), <https://www.reuters.com/legal/government/rovner-first-woman-judge-7th-circuit-take-senior-status-2024-01-12/> [<https://perma.cc/N8AY-9DF3>].

¹²⁶ See *supra* notes 13, 107 and accompanying text.

decidedly collaborate to vouch for the nominees through the panel with speedy, rigorous, and fair hearings; complete, equitable, and candid discussions of their qualifications; and positive committee votes, followed by thorough and robust chamber debates and swift confirmations.