

Diversity and the judiciary under the Biden Administration

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Abstract. *L'Amministrazione Biden e le diversità nella magistratura* – The scope of this investigation was to evaluate the extent, degree, and effectiveness of the Biden Administration's efforts in injecting diversity into the judiciary. Thus, the research analyzed Biden's ability to navigate the Senate's opposition to exercise the appointment power, and consequently measure its success both in sheer numbers and in signification of the quality and the quantity of the inclusion and diversification in his selection of the appointees. The results show that on this matter, Biden has been a transformative and impactful president whose mitigating efforts for a more equal judiciary will - in the long run - most certainly balance his predecessor's ultra conservative influx.

Keywords: Judiciary; Appointments; Diversity; Inclusion; Minorities.

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1. Introduction

Upon taking office on 20 January 2021, less than 15 days after the insurrectionist's attempted coup and assault of the Capitol, Biden felt the urgency to reestablish domestic stability by reinforcing in words and deeds the ideals that inspired the American experiment; to mend the divisiveness created by his predecessor's hateful rhetoric and encourage the healing of the "soul of America". Accordingly, Biden reaffirmed and reinforced the idea that the force of the United States of America is rooted in the composition of its multicultural society made of the fusion of its native population, its immigrants, and all their inventiveness and their dreams. In short, the strength of America is to be found, and is to be celebrated, in its melting pot. Furthermore and from the first day, the Biden Administration started building back the trust in a fair and equal rule of law; to reintroduce non-confrontational relations and bipartisan cooperation between institutions; to quietly pursue the daily administrative responsibilities with little or no involvement of the social media; to bring back normalcy, decency and dignity to the presidency; to nominate and appoint experts to governmental responsibilities and to his own Cabinet who would represent the widest variety of cultures, nationalities, faiths, ethnicities and minorities ever appointed in the history of the country.¹ Biden was convinced that this

¹ On this front Biden followed in the footsteps of his Democratic predecessors Clinton and Obama although Biden's Cabinet went from 14 to 15 members and added 10 Cabinet level members. The restricted Cabinet (15 members) integrated by the Cabinet-level members (25) does indeed picture a variety of the American population

overarching political strategy would be fundamental in attempting to restore the credibility and the trust of the people in the institutions. And while he immediately tackled the urgent needs of the country with a strong response to the covid epidemic and the economic recession brought about by an overwhelming dereliction of duties by his immediate predecessor, Biden was particularly concerned by the inevitable long-term negative effect of Trump's appointments to the judiciary that had contributed in no small measure to shape an ultra-conservative judicial body that would haunt many generations to come.² Thus, the concerted effort to mitigate his predecessor's actions by filling every vacant bench he inherited and being prepared to fill all vacancies under his watch by recurring to the same diversity strategy he was implementing in the appointment of all government officials.

The incisiveness of a president can be measured by several means. None, perhaps, more intriguing and more long term impactful than the appointment of judges to the federal courts. In fact, every president, no matter the party affiliation, has the duty to, and has had to deal with, appointing judges and, at times Justices, for life tenured positions to cover the vacancies on the constitutional courts³ and Joseph R. Biden has proven to be a transformative and consequential president also on this front notwithstanding the difficulties in confronting a divided and almost paralyzed legislative branch during the second half of his term in office.⁴

whereas the Cabinet is composed of 4 Latinos, 1 Native American, 2 Asian Americans, 5 African Americans; 13 nonwhites, 12 women, and 1 openly gay. Yet more groundbreaking is the list of the "First" in the history of appointments: the first woman Secretary of the Treasury; the first Native American Secretary of Interior; the first Hispanic Secretary of Homeland Security, the first gay Secretary of Transportation and the first Black Secretary of Defense.

For more on the groundbreaking appointments, see: P. Passaglia, *Back to Normalcy, Straight to Diversity: A Provisional overview of President Biden's Appointments*, in *DPCE online*, 2023, Special Issue, *The American Presidency after two years of President Biden*, 17-33, 29; and K.D. Tenpas, *Just how diverse is President Biden's prospective Cabinet?*, in *The Brookings Institute*, January 13, 2021, <https://www.brookings.edu/articles/just-how-diverse-is-president-biden-prospective-cabinet/>.

² M.E. de Franciscis, *The independence of the Judiciary in the Trump era*, in *DPCE online*, 1/2021, 945 ff.

³ Constitutional courts are those Federal Courts which "Congress may from time to time ordain and establish" according to the mandate of Article 3, Section 1 of the US Constitution. In addition to the Constitutional Courts, Congress created several Article I, Section 8.9 or legislative courts, that do not have full judicial power. Article I Courts are the US court of Appeals for Veteran Claims, the US court of Appeals for the Armed Forces and the US tax court. Congress also established Article IV Courts, called Territorial Court because of their jurisdiction: District Court for the Northern Mariana Islands; District Court of Guam; District Court of the Virgin Island and the High Court of American Samoa. For more see: US Courts. <https://www.uscourts.gov/about-federal-courts>.

⁴ The 2022 midterm election in fact introduced a lame duck highly confrontational 118th Congress, whereas the Republican party controlled the House of Representatives with a slim majority of 4 members (Democrats 213 and Republicans 222 while the threshold to legislate is 218) and the Democratic party controlled the Senate with a margin of 1 senator (Democrats 51 and Republicans 49 while the threshold for most decisions is 60).

The aim of this paper is to measure the success and the strength of the Biden Administration in fulfilling his proclaimed goal of inserting in the judiciary diversity appointments to counterbalance the ultra-conservative ones of his predecessor. The analysis will proceed by outlining the categories of the courts to which a president must appoint judges; to delineate the nature of the shared appointment power and to briefly summarize the statistics of the Trump Administration. This will allow a representation of the situation of judicial vacancies inherited by Biden on inauguration day⁵ and allow for analysis of his actual performance.

2. The Federal judiciary

As it is well known, the federal judiciary is independent of the judiciaries of each of the 50 States⁶ which have the sole and exclusive competence on all and every subject matter the Constitution ascribes to the States through the 10th Amendment.⁷ State courts are thus the final arbiters of State laws and Constitutions. They can interpret the federal laws and Constitution as they apply to the State laws and Constitution pertaining a given case they are deciding, yet their interpretation of federal law or of the U.S. Constitution may be appealed to the U.S. Supreme Court who may choose to hear or not to hear such cases. Sometimes, the jurisdiction of State courts will overlap with that of federal courts, meaning that some cases can be brought in both courts, and in this event, it is up to the plaintiff to initially choose whether to bring the case in state or federal court.

Likewise, it is a generally agreed assumption that any reference to the federal judiciary is a reference to the courts established by Article III, Section 1, and not to those established by Article I and Article IV of the U.S. Constitution. Below the U.S. Supreme Court there are 94 District level trial courts⁸ and 13 Appeals courts.⁹ The 94 federal judicial Districts are organized into 12 regional Circuits, each of which has a court of Appeals.¹⁰

⁵ The inauguration day statistics has always been considered the key element to evaluate the strength of an Administration since *Marbury v. Madison* (1803) and until the final biennium of President Obama (2015-2017) during which term Obama was only allowed to make 2 appointments to the Courts of Appeals and 18 appointments to District Courts. M.E. de Franciscis, *The independence of the Judiciary in the Trump era*, cit., 948-949.

⁶ All in all, there are approximately 30.000 State judges who oversee over a 1.000.000 cases per year. Some judgeships have life tenure, and some have fixed terms; some are elected, and some are appointed based on the constitutions and the laws of each State.

⁷ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

⁸ District courts resolve disputes by determining the facts and applying legal principles to decide who is right. Trial courts include the district judge who tries the case and a jury that decides the case. For more, consult: US Courts: <https://www.uscourts.gov/about-federal-courts>.

⁹ The Appellate court's task is to determine whether the law was applied correctly in the trial court. A court of appeals hears challenges to district court decisions from courts located within its circuit, as well as appeals from decisions of federal administrative agencies. *Ibid*.

¹⁰ There is at least one District court in each State, and the District of Columbia. Each district includes a U.S. Bankruptcy court as a unit of the district court. Four territories

Appeals courts consist of three judges and do not use a jury. Taking into consideration the size of the United States and of its population, the Federal Judiciary represents a very small cluster. There are, in fact, 1770 judgeships in 209 “inferior courts” and approximately half of these judges (885) are appointed by the President of the United States for a life term, while the remaining judges are selected by peers sitting on Circuit or District Courts for terms of defined lengths.¹¹ Essentially, Federal judges and Justices are selected by the President and confirmed “with the advice and consent” of the Senate¹² and “shall hold their Offices during good Behavior”.¹³ Judges may hold their position for the rest of their lives, but many resign or retire earlier. They may also be removed by impeachment by the House of Representatives and conviction by the Senate.¹⁴ One exception to the lifetime appointment is for magistrate judges, who are selected by district judges and serve a specified term.

Most of the federal cases stop at the District courts or at the court of Appeals level, and very few cases will be decided by the U.S. Supreme Court. In fact, more than 90 percent of the federal cases (both civil and criminal) will be given the ultimate determination by the lower two tiers of the judiciary while the Supreme Court chooses to review fewer than 3 percent of the 7.000 to 8.000 cases filed with it annually.¹⁵

If the structure of the judiciary is lite, the weight of the determinations reached by the federal courts is conversely heavy, due in most part to the acceptance, and at times even expectation, of judges recurring to creative interpretations of the Constitution. During the 1950s and 1960s the courts became one of the main avenues for promoting and protecting civil rights but then, the judicial right blossomed in full daylight in the aftermath of the Warren Court¹⁶, and this is why the presidential appointment power has become more and more an essential “political” tool and an instrument of measurement of the incisiveness of a president. Historically, and until the Court decided to become involved in the resolution of the presidential

of the United States have U.S. District courts that hear federal cases, including bankruptcy cases: Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands. *Ibid.*

¹¹ In contrast with the workload of States’ judges, the Federal counterparts oversee approximately 40.000 cases per year.

¹² The appointment power is regulated by Article II, Section 2 of the U.S. Constitution. For an in-depth analysis of the procedure and its political downfalls and nature: M.E. de Franciscis, *Il Potere di Designazione: evoluzione della costituzione statunitense*, Napoli, 2009.

¹³ Article III, Section 1 of the U.S. Constitution.

¹⁴ Throughout history, only fifteen federal judges have been impeached due to alleged wrongdoing.

¹⁵ For more on the subject, Federal Judicial Caseload Statistics, <https://www.uscourts.gov/about-federal-courts>.

¹⁶ Chief Justice Earl Warren was Chief Justice from 1953 to 1969. He developed a reputation for protecting individual freedoms and the expansion of civil rights. But then the Burger Court (1969-1986) ushered in the rise of the judicial right that was transformed in judicial activism to the right with the William H. Rehnquist Court (1986-2005). It was Chief Justice Rehnquist who under minded civil rights and weakened the federal government and it is his successor, John Roberts (2005 to present) who is now abolishing those rights while presiding an ultra-conservative majority within the Supreme Court.

election in 2000¹⁷ and then more and more until the 2024 term and the Trump “immunity” opinion,¹⁸ the attention of both the public and the media was altogether focused on the appointments to the Supreme Court with little or no interest or awareness regarding the nominations of judges to the “minor” or “constitutional” Courts with the imaginable exception of the local communities and media. Perhaps it was because of the relevance of its opinions and their ripple down effect throughout the nation; perhaps because of its relatively small size; perhaps because of their extremely reserved lifestyle, for most of its existence, and with few exceptions, the Supreme Court Justices were clothed in an aura of wiseness and were perceived as the only non-political and non-politicized branch of government. A diametrically different approach was reserved to the judges of the lower courts who were in general perceived as part and parcel of the administration of justice; a necessary structure for affirming the rule of law. Thus, the appointing process was politically dominated yet the appointed judges were perceived as being above and beyond politics.

3. The Appointment Power

There is perhaps no better application of the principle of checks and balances that characterizes the American experiment, than the joining of the executive and legislative branches to appoint the federal judiciary. Indeed, in an environment of cooperation and bipartisanship the Senate exercised its role of adviser to the President and, almost always, gave its consent to the appointments with the aim of leaving as little bench vacancies as possible on behalf of a smooth administration of justice. The prevailing of a deference to the executive and an attitude of “country over party” favored the smooth achievement of the desired outcome. Likewise, there is no better example of the negative effects of a confrontational and highly divided political environment than the malfunctioning of the appointing power whereas the political party affiliation prevails over the needs of the country as the last biennia of presidents Obama and Biden clearly prove.¹⁹

The judicial appointment process officially begins with a vacancy on the bench. Since federal judges are appointed for life, vacancies may occur because of death, retirement or impeachment.²⁰ Following the

¹⁷ *Bush v Gore* 531 U.S. 98 (2000)

¹⁸ *Trump v. United States*, 603 U.S. 593 (2024)

¹⁹ President Trump inherited 108 vacancies from President Obama (1 Supreme Court; 17 Courts of Appeals and 88 District Courts) whose last biennium witnessed an almost complete stall in judicial appointments at the hands of the Senate majority, while President Biden inherited from President Trump only 46 vacancies (3 Courts of Appeals and 43 District Courts). However, the minimum Senate Democratic majority in this last biennium of the Biden Administration has favored a slower pace in judicial consents which in turn could mean that the next president might inherit a higher number of vacancies than Biden inherited from Trump. For more on the subject, see: Federal Bar Association. Federal Judiciary Tracker at: https://fedbar.org/wp-content/uploads/2021/07/Biden-Judiciary-Tracker_0706_LR.pdf.

²⁰ Most of the time the vacancy occurs by voluntary retirement around the age of 70. Not all judges wish to retire, however, and there is no recourse to force them to retire since the appointment is for life. There are many judges edging and, in their eighties,

announcement of the forthcoming vacancy, the vetting phase formally begins. Every Administration has a vetting staff, and a relevant list of ideal candidates based on the guidelines received by the president elect in the transition period as to be ready to start on the first day. Every president thus establishes the footprint to leave on the judiciary and the requests can vary from age to formal education, to kind of internships undertaken, to work experience and, more recently, to legal philosophy, to gender and to ethnic origin. The prioritizing order of the requirements can vary based on each president's own priorities. Traditionally the White House resorted to The American Bar Association (ABA) for guidance and help both to find potential judicial candidates or to help evaluate potential candidates.²¹ Presidents George H. Bush, George W. Bush and Donald J. Trump moved away from this tradition, and did not turn to ABA but rather preferred to turn to The Federalist Society undeniably changing the nature of the judiciary and transforming it in a ultra-conservative arm of the executive branch. Presidents William J. Clinton, Barack H. Obama and Joseph R. Biden Jr in turn veered back to the ABA less ideological and more objective assistance. The final stage of the vetting of the "right" candidates, implies the involvement of the president who makes the final call. The White House then unofficially informs the two senators of the State in which the vacancy has occurred to receive a green-light to proceed.²² Having received a *nihil obstat* to the nominee, the White House advances in the process by transmitting the name, curriculum vitae and all necessary information pertaining to the designated individual to the Senate for its advice and consent. Once the nomination is assigned to the Senate Judiciary Committee and before it is placed on that Committee's Calendar, the Chair will officially inform the two senators of that state in which the vacancy had occurred to receive a "blue slip".²³ If both, or only one, senator reply in the negative, it traditionally signaled the non-viability of the nominee to proceed, and possibly the selection of a new candidate; in the event both senators reply in the positive, the procedure provides for an initial and thorough examination of the designated individual by the Senate Judiciary Committee and a subsequent vote by the Senate as a whole.²⁴ The quorum originally

and one judge who is 97 has been barred by her colleagues on the Circuit Court to hear cases yet refuses to retire. Many judges and all the Justices who wish to retire will do so during a presidency of the same political party of the president who appointed them. Usually, the White House is notified by the Department of Justice three months in advance of the vacancy occurring. During the Biden Administration there has been an average of 72 vacancies per month.

²¹ The American Bar Association is the largest voluntary professional association in the world with more than 400.000 members.

²² This procedure is known as Senatorial Courtesy and has been followed by all presidents except by President Trump.

²³ This is literally a blue slip of paper that is used by the two senators to return to the Chair of the Judiciary Committee either marked positively or negatively.

²⁴ During the Trump years, the Chair of the Judiciary Committee suspended the blue slip tradition allowing the Senate to give its consent to 234 judgeships notwithstanding the opposition of the State senator/s and of the Democratic senators. In the last two Congresses instead, during the Biden Administration, the Chair of the Judiciary Committee has reverted to the traditional deference towards the senators of the specific

established by the Founding Fathers in Article II, Section 2 was of two thirds and thus their clear intention was to assure an independent judiciary resulting from a bipartisan political agreement and as such it remained until 2013. In fact, at the turn of the millennium, politics had become more and more radicalized and confrontational and less and less cooperative and bipartisan. Meeting the high quorum for confirming appointments to the bench became more challenging to achieve and, conversely the ability of the minority party to block or to stall the appointments at each and any stage of the consent process became an almost unsurmountable veto. To facilitate reaching consensus while endeavoring to block the recourse to filibustering, the Democrats who were then in control of the Senate, in 2013 changed the rules so that federal judicial nominees would only be requiring confirmation by a simple majority.²⁵ This new rule backfired in the last biennium of the Obama Administration²⁶ whereas in the 2014 midterm election the Republicans gained nine seats and the majority control of the chamber. The new majority engaged in a staunch obstructionism towards the confirmation process that inevitably and intentionally handed Trump 106 judicial vacancies on inauguration day 2016.²⁷

When the Senate has fulfilled its function of “advice and consent” the nomination is returned to the White House and the President will sign the commissioning, thus formally ending the process of filling the vacancy with the appointment of a judge. In his single term, Donald J. Trump appointed 234 federal judges, perhaps his most enduring legacy on American society and institutional construct, the long- term effect of which, through an ultra-conservative Judiciary will, as already mentioned, plague many generations to come.²⁸ In fact, in addition to the three Supreme Court Justices, he appointed 54 Appellate and 174 District judges. His success was due to a stronger Republican majority in the Senate and to a relatively modest Democratic opposition. Indeed, the opposition was so modest that it even allowed for 13 confirmations to occur during the lame-duck period after the election and until 12:00 noon on January 20th. Thus, it is fair to hypothesize that four years later, come this November, if Democrats retain the White

State. For more on this tradition and its vetoing potential see: <https://www.acslaw.org/wp-content/uploads/2018/10/The-Blue-Slip-Tradition.pdf>.

²⁵ For more on the “nuclear option”: M.E. de Franciscis, *The Independence of the Judiciary in the Trump era*, cit., 951 and footnote 25.

²⁶ Obama nominated 70 individuals for 104 different judgeships during the 114th Congress yet of all only 20 were confirmed.

²⁷ Of these vacancies 88 were at the District court level, 17 were appellate courts and one was a Supreme Court vacancy. This latter occurring upon Justice Ginsburg death on September 18, 2020. “The reasons for the vacancies—old news to most—was the flimsy confirmation record in the 2015-16 Senate (the 114th), with its new Republican majority. Just as it refused to consider Merrick Garland’s Supreme Court nomination, it shut down the lower court confirmation process. That’s water under the bridge. But documenting how the 114th Senate ratcheted up the contentiousness and polarization of an already broken confirmation process suggests how much harder it will be to ratchet it back into something with more comity and bipartisanship.” R. Wheeler, *Senate obstructionism handed a raft of judicial vacancies to Trump- what has he done with them?* in *Brookings online*, June 4, 2018, <https://www.brookings.edu/articles/senate-obstructionism-handed-judicial-vacancies-to-trump/>.

²⁸ M.E. de Franciscis, *infra*, footnote 2.

House, Republican senators will have no lame-duck basis to resist post-election confirmations.²⁹ This additional window would be a boost to Biden's already amazing achievements in judicial appointments. Amid the many uncertainties of the forthcoming last months of the Biden Administration; amongst the fears of more turmoil and violence after the election and through the transition period all the way to the next inauguration, there is one reservation that I share with Wheeler: "If Democrats lose the White House, will Republicans ... honor the 2020 precedent and allow lame-duck confirmation of at least some of Biden nominees/confirmations?"³⁰ I fear the answer will be in the negative, yet if it were to be in the positive, it would mean that Biden could cover in part or in total the vacancies up to January 20, 2025 and thus exceed the previous Administration's four-year totals. Reassuringly, it appears the Administration is ready and willing to pursue this goal if the post-election's politics will allow for it.³¹ In effect there are 28 individuals presently (September 26, 2024) awaiting to be confirmed³² (5 to the Appeals and 23 to the District Courts) while 23 vacancies have been announced to occur just before the end of Biden's term (5 for the Appeals and 18 for the District Courts). In the event all these confirmations could be made on time, Biden would have appointed all in all 264 Article III judges. Not a small feat for the outgoing Administration and neither for the people, since it would bring to an almost even level the making of the federal judiciary, thus counterbalancing the ultra-conservatives of the previous Administration with the liberals and diverse judges of the present Administration. Were the Democrats to hold the White House, Biden's success of judicial appointments will undoubtedly be a strong foundation for Kamala Harris to build on in the next four years, keeping in mind, however, that there's no swift way for the Democrats to reverse the impact the Trump Administration has had on the federal judiciary.

4. Biden's Judicial appointments

Judicial appointments rely on the cooperation of many institutions and on the goodwill of even more people involved in the process. Biden has always been a fervent believer in bipartisanship and a builder of personal relations "across the aisle". These proved to be fundamental in his Administration's amazing successes in a term characterized by divided and highly confrontational Congressional relations. In terms of absolute numbers, and notwithstanding the political divisions, and the relatively few vacancies inherited, and regardless of the even fewer Appellate (Circuit) and Supreme Court vacancies throughout his term in office, Biden is still expected to be

²⁹ R. Wheeler, *cit.*

³⁰ *Ibid.*

³¹ P. Brest, Special Assistant to the President and Senior Counsel was quoted saying: "The Biden-Harris Administration understands the vital role that judges play in protecting the freedoms of all Americans and will continue to work to fill every possible vacancy" in T. Sneed, *Scale of Trump's appeals' overhaul appears unmatched by Biden, even as Democrats could approve more total judges*, in *CNN editorial*, August 29, 2024.

³² These individuals can be further categorized by their "pending" stage. In fact, there are 17 individuals waiting for floor vote; 8 are waiting to be reported out of the Senate Judiciary Committee and 3 are waiting for their hearings.

successful in appointing judges equally or in a higher number than his immediate predecessor was. In fact, notwithstanding the leanest possibly viable majority in the Senate throughout the whole term³³, Biden succeeded, as of 18 September 2024, to confirm 213 Article III judges: 1 Associate Justice at the Supreme Court; 44 judges to the Courts of Appeals and 165 District Court judges. Furthermore, just as a footnote to the overall appointment figures, the Senate has also confirmed 14 more judges nominated by Biden to Article I courts: 5 to the United States Court of Federal Claims; 5 to the United States Court of Military Commission Review; 1 to the United States Court of Appeals for the Armed Forces and 3 to the United States Tax Court. Although in general Article IV judges are not included in the overall statistics of federal judiciary appointments because theirs are not life appointments, it is deemed a useful ancillary information to mention that Biden succeeded to appoint 1 judge to Territorial Courts and to nominate 2 who are, as of this date, amongst the pending cases.

A statistical analysis of Biden's appointments in his first year in office, shows that although Trump had reduced the vacancies to 5.4 percent³⁴ and although Biden wasted no time and kept a faster pace than his predecessors, the number of judicial vacancies increased by 61 percent during 2021 in strong part due to 56 judges who vacated their appointed position in 2021 by taking "senior status," the highest number on record. As already mentioned, a judge is prone to take the "senior status" or to retire when at the White House there is a president of the same political party of the one who appointed him/her.³⁵ Thus, it should come as no surprise that two-thirds of these had been appointed by Presidents Obama and Clinton. In his first year in office Biden succeeded in appointing 40 judges,³⁶ which converts to 4.7 percent based on the Confirmation Productivity Index.³⁷ Amongst his predecessors, Biden holds the record of most judicial appointments during the first year in office, being second only to Reagan's 5.9 percent, and against Trump's 1.3 and Obama's 1.5. Biden's appointments record is confirmed as the second highest even when taking the size of the judiciary into account by presenting each President's first-year appointment's total as a percentage of existing positions on Article III courts filled that year, Biden clearly performed better than Trump (2.2 percent) and Obama (1.5 percent).³⁸ When measured on the two years finish line Biden had appointed 75 judges compared to Trump's 51 and Obama's 42, the most of any

³³ In the 117th Congress the Senate was evenly split 50-50 and the Democratic party succeeded in obtaining confirmation of the judicial appointments by the Senate- as- a- whole by recurring to the vote of Vice President Kamala Harris. In the 118th Congress, the Democratic party had in the Senate a majority of one: 51-49.

³⁴ To be compared to an average of 8.7 percent when Biden's six predecessors took office. For more data and analysis, see: T. Jipping, *President Biden's Judicial Appointments: A first-year analysis*, in *The Heritage Foundation*, March 22, 2022.

³⁵ *Infra* paragraph 3.

³⁶ For more, US Courts. <https://www.uscourts.gov/about-federal-courts>.

³⁷ The Confirmation Productivity Index takes vacancies into account, dividing each President's first-year appointment total by the average vacancy rate during the year. T. Jipping, *cit.*

³⁸ *Ibid.*

president since Kennedy's 102.³⁹ One more analysis, this time made on the third year in office, and thus after the midterm elections, reveals that by November 5, 2023, Biden is not overall faring well compared to his immediate predecessor.⁴⁰ In fact, by that date Biden had appointed 148 judges compared to Trump's 155. Biden again does not fare well in comparison with his immediate predecessors when the evaluating mean is the share of current active judges appointed by a chief executive. Of the 798 active federal judges as of November 5, 2023, just 18 percent had been appointed by Biden while there were 28 percent of Trump's and 31 percent of Obama appointees. Biden faring better only in comparison to G.W. Bush's 16 percent⁴¹. By Biden's third year in office the federal judiciary was almost evenly divided between appointees of Democratic and Republican presidents. In fact, it was ascertained that 54 percent of all active judges had been appointed by the former, while the latter presidents appointed the remaining 46 percent.⁴² Although the largest share of active judges has been appointed by the Democrats the percentile data confirms what the plain numbers were already suggesting. That is to say that it is at the lower federal courts, at the District courts, that Democratic presidents appointments occur for a 56 percent share, while 53 percent of the judges appointed by Republican presidents are seated on the Appellate courts. Last, yet not least relevant and, blatantly obvious to all, is the 67-33 percent divide in favor of the Republicans in the Supreme Court.⁴³

In sum, as of September 2024, the most significant Biden imprint in the composition of the judiciary, from a rigorously arithmetical point of view, will be on the District Courts⁴⁴ whose decisions, however, are relevant only to the litigants and do not create jurisprudence, while the other two tiers of justice do indeed create jurisprudence and affect in part or in total the American population.⁴⁵ The stretch and weight of the decisions of the latter are well known to all and this is not the place to divulge in it. Yet it seems appropriate to reiterate that the former are often the courts of last resort for issues from voting rights to immigration, to the environment, to reproductive health, and thus, the "character" of the individuals to be appointed should prevail over political affiliation during the vetting stage. Nevertheless, it is self-evident that presidents will more favorably focus on vacancies at the Circuit and Supreme Court level to establish their own ideological legacy. The argument that an Administration mostly shapes the judicial interpretation of the laws and consequently mostly impacts on society through the Appellate courts who are the final point of arrival for

³⁹ J. Gramlich, *Biden has appointed more federal judges than any president since JFK at this point in his tenure*, in *Pew Research Center*, August 8, 2022.

⁴⁰ J. Gramlich, *How does Biden compare with other presidents in total judges appointed?*, in *Pew Research Center*, December 4, 2023.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ 166 District Court judges have been appointed as of September 26, 2024.

⁴⁵ The people affected by the decisions of each Circuit Court of Appeals are indeed those people living in that Court's Region since these courts set precedence for all lower courts in that Region while the decisions of the Supreme Court affect the totality of the people.

approximately 90 percent of the cases,⁴⁶ does not diminish the results reached by Biden. In fact, from a strictly mathematical tally, the Biden Administration might succeed in reaching a total of appointments approximately equal to his predecessor, even if their split totals for each tier of justice will be disproportionately in favor of the District court level rather than Trump's higher numbers in favor of the Circuits and the Supreme Court. And while it cannot be denied that Trump succeeded in flipping more appellate seats that used to be assigned to moderate or liberal judges, Biden has accomplished an equalization of the overall composition of the Circuit courts whereas a narrow majority of them will have more Democratic appointed judges than Republican's appointees,⁴⁷ and Democratic appointees currently make up the majority of active-status judges in seven of the 13 Circuit courts.⁴⁸ Hence, it is easily foreseeable that no matter who the next president will be, the priority of its Administration will be on the Circuit courts and every vacancy will be relevant to either reestablish and reinforce the balance between conservative and liberal magistrates by capsizing the effect of the Trump's presidency or by overturning the achievements of the Biden's presidency.

5. Biden's diversity Judicial appointments

Biden will rightfully be considered one of the most, or perhaps "the" most transformative and consequential president since Franklin Delano Roosevelt for his legislative successes and, likewise he will be remembered as a transformative and consequential president for his commitment to diversity. As he diversified the Cabinet and the high executive Offices, so he did within the Judiciary. In fact, he continued and improved on the process of diversification of the judiciary that had been one of the flagships of the Obama Administration. Yet, Biden's brand of diversification is twofold: like Obama, he made a concerted effort to appoint by gender and ethnicity but unlike any of his predecessors he also vetted the candidates by their professional expertise and legal education to diversify the professional background of the judges. Thus, Biden's diversification of the judiciary has been accomplished by inserting a combination of a) legal experiences traditionally not represented including public defenders and civil rights attorneys; and b) by widening the concept of diversity from the traditional "gender, race and ethnicity" to one that included national origin, sexual orientation, religion, veteran status and disabilities. In fact, Biden felt that the deliberate adoption of this brand of diversification would contribute to the making of a judiciary that would "look" like the American society which, in turn, would help the perception that citizens have of the judiciary. He felt, like many, that a judiciary that resembles or, at the least, can recognize the individual litigant when the latter is dealing with it, in the long run will be perceived by the same litigant and by society at large, as fair, unbiased and

⁴⁶ *Infra*, footnote 15.

⁴⁷ Trump flipped three Circuit Courts' composition from a majority of Democratic to a majority of Republican appointed judges, but Biden has flipped one of those three circuits back.

⁴⁸ US courts. *cit.* in footnote 8.

trustworthy. This Biden goal was confirmed by Senate majority leader Charles Schumer who has argued that when Americans go to court, “they should trust that those who render judgment will be able to understand each litigant’s lived experience and bring a modicum of human understanding required to apply the law equitably”.⁴⁹ Or, as Associate Justice Elena Kagan said: “People look at an institution and they see people who are like them, who share their experiences, who they imagine share their set of values, and that’s a sort of natural thing and they feel more comfortable if that occurs.”⁵⁰ It can be argued however, and indeed it has been argued by the more conservatives and by those who interpret the Constitution and the will of the Founding Fathers according to the originalist theory, that the perception of an equitable application of the law, or the perception that the judges hold a modicum understanding of the litigant’s experience, are concepts that are and should remain estranged to the exercise of the law and that they pertain more to other sciences than they do to the legal world.⁵¹ It can be counter-argued, in line with Biden’s belief, that at the time he took office, there was indeed a need to rebuild the trust in all institutions as well as in the judiciary; that the mistrust seeded by his predecessor was grave, and that weighty actions were to be taken to reduce the damage and prevent the destruction of the American experiment. Perception therefore is to be used to help recreate a positive public consensus of trust in the judiciary, yet building trust by diversifying the judiciary should not be the overwhelming goal; it should not prevail over expertise; and it should not be the fundamental prerequisite of a good candidate to the federal bench rather, diversity should be the “icing on the cake”. The available qualitative data⁵² show that the Biden Administration indeed followed exactly this methodology in vetting for nominees. However, to evaluate the qualitative success of this strategy and whether it will have efficaciously contributed to a positive perception of the judiciary will be for future scholars to say, while the only evaluations that can be made at present are those relevant to the achieving of a more inclusive judiciary. The contrast between President Trump and President Biden can not be more compelling since the former has appointed the least racially and ethnically diverse group of federal judges of any president over the past three decades.⁵³ Biden, in fact, inherited from Trump a judiciary where 80 percent of all the sitting judges on the federal bench were white and 73 percent were male and where people of color and women were 20 and 27 percent respectively while LGBTQ judges comprised less than 1 percent. The numbers improved when narrowing the pool to only the active judges but only marginally.⁵⁴ Last but not least relevant to an analysis of inclusion and diversification is the question of religious

⁴⁹ Quoted in T. Jipping, *President Biden’s Judicial Appointments: A first-year analysis*, in *The Heritage Foundation*, March 22, 2022.

⁵⁰ A. Liptak, *Sonia Sotomayor and Elena Kagan Muse Over a Cookie-Cutter Supreme Court*, *The New York Times*, September 5, 2016, available at <https://www.nytimes.com/2016/09/06/us/politics/sotomayor-kagan-supreme-court.html>.

⁵¹ T. Jipping, *cit.* print display pages 1-3/14.)

⁵² Federal Judicial Center - Biographical Directory of federal judges.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

affiliations of the federal judges. While it can be difficult to acquire up-to-date information on the religious affiliations of federal judges, as they may not wish to disclose whether they adhere to any and which faith, a study published in 2017 found that among federal appellate judges, 45.1 percent were Protestant, 28.2 percent were Catholic, 19 percent were Jewish, 5.1 percent were Mormon while Hindu judges comprised just 0.5 percent. Interestingly the study's authors were unable to identify any Buddhist, Muslim, or atheist federal appellate judges.⁵⁵ Contrary to his immediate predecessor who appointed three associate Justices,⁵⁶ Biden only had one opportunity, thus far, to appoint an associate Justice to the US Supreme Court and, while his nominee falls perfectly in the criteria of the binary diversity, its mitigating force and its capability to cut into the mistrust of the highest court and the extremely distrusted institution,⁵⁷ can only be very marginal at present. In fact, the appointment of Ketanji Brown Jackson did not modify the ideological equilibrium of the composition of the Supreme Court⁵⁸ that remained unaltered: six justices appointed by Republican presidents and three justices appointed by Democrats, with a 67-33 percent split⁵⁹ yet, Biden's choice can be considered amongst those based on gender and race as Justice Jackson is the first Black woman to serve on the highest court; she is the third Black Justice since Thurgood Marshall was appointed by Lyndon B. Johnson in 1967 and Clarence Thomas was appointed in 1991 by George H. Bush, and she is only the sixth woman since Ronald Reagan appointed Sandra Day O'Connor in 1981.⁶⁰

Biden has broken several records by choosing to diversify his judicial appointments. The following sub paragraphs will attempt to shed some evidence on the most egregious of these: Biden has appointed more women than any of his predecessors; more women of color than any president; more Black women to Circuit court judgeship than all presidents combined, and the fewer white judges (only 49) since Eisenhower.

5.1 Gender

⁵⁵ S. Shahshashani and L.J. Liu, *Religion and Judging on the Federal Courts of Appeal*, 14 *J. Emp. Leg. Stud.* 716 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2971472.

⁵⁶ Trump appointed Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett.

⁵⁷ Fewer than half of Americans (47%) now express a favorable opinion of the court, yet the court's favorable rating is 23 percentage points lower than it was in August 2020. For more data on this subject, see: J. Copeland, *Favorable views of Supreme Court remain near historic low*, *Pew Research Center*, August 8, 2024.

⁵⁸ She replaced Justice Breyer who retired at 83 years old after 28 years on the court. He had been appointed by President Clinton in 1994.

⁵⁹ J. Gramlich, *Most of Biden's appointed judges to date are women, racial or ethnic minorities—a first for any president*, *Pew Research Center*, December 4, 2023.

⁶⁰ Overall, there have been 115 Justices who have served on the Supreme Court of these the three Black Justices are Thurgood Marshall (1967), Clarence Thomas (1991) and Ketanji Brown Jackson (2021) while the six women Justices are Sandra Day O'Connor (1981), Ruth Bader Ginsburg (1993), Sonia Sotomayor (2009), Elena Kagan (2010), Amy Coney Barrett (2020) and Ketanji Brown Jackson (2021). While Jackson is the first Black woman Sotomayor is the first woman of color, the first Hispanic and the first Latina to serve on the Supreme Court.

When diversifying, the most recognizable classification falls under the label of “gender” and the next subcategory is that of “women”. Notwithstanding the outstanding numbers of Biden’s appointments, women remain a minority within the federal judiciary and non-white women more so. A search held on 7 October 2024, of the biographical data base of the Federal Judicial Center, shows that from 1789 to present there have been 4.000 federal judges, of which only 589 women while 3.411 men. And as of 1 October 2023, there were 1.423 active judges overwhelmingly male and white, respectively 68 and 76 per cent. Only about one third of active judges are women,⁶¹ while earlier research of the same data base, revealed that just 70 of the 3,843 people who have ever served as federal judges in the United States – fewer than 2 percent – have been Black women.⁶² The first woman federal judge⁶³ was appointed by President Coolidge in 1928, just 8 years after women’s suffrage was introduced. In 1934, Franklin Delano Roosevelt appointed Florence Allen to be the first woman on a bench of the U.S. Court of Appeals and in 1949 Burnita Shelton Matthews was appointed by Harry S. Truman to be the first woman to serve as a U.S. District Court judge. However, it was not until the Carter Administration that a decisive effort to appoint women to federal judgeships got underway. Between 1977 and 1981 James E. Carter Jr. appointed 28 women and 147 men to federal courts. A giant leap forward considering that his immediate predecessor had only appointed one woman out of 62 judges, a share of 3 percent versus Carter’s 16 percent.⁶⁴ Every president after Carter proceeded to appoint women in two digits numbers except for his immediate successor, Ronald Reagan who only appointed 8 women.⁶⁵ Not surprisingly, from Kennedy to Trump it has been the Democratic presidents who have appointed more women than Republican presidents. According to the Federal Judicial Center nearly two-thirds (66 percent) of the women who have ever served as federal judges were appointed by Democrats, compared to about a third who were appointed by Republicans.⁶⁶ Further confirmation of the Democrats willingness to diversify, can be extracted from more data available on the total appointments of judges by presidents of either major party, and on the share of women appointments. This data shows that, of the 1.724 judges ever appointed by Democratic presidents, 16 percent have been women and of the 1.832 appointed by Republican presidents, 8 percent have been women.

⁶¹ Data “published” by the Federal Judicial Center, the research and education arm of the federal judicial branch.

⁶² That figure includes single-race, multiracial and Hispanic or Afro-Latina Black women who have served on federal courts governed by Article III of the U.S. Constitution, Black women account for a small fraction of the federal judges who have served to date. For more on the topic, see: J. Gramlich, *Black women account for a small fraction of the federal judges who have served to date*, in *Pew Research Center*, February 2, 2022.

⁶³ Genevieve Rose Cline was appointed to the U.S. Customs Court (later known as the Court of International Trade).

⁶⁴ For statistical uniformity, when not otherwise specified, all appointments data refer to the third year in office.

⁶⁵ J. Gramlich, *Trump has appointed a larger share of female judges than other GOP presidents, but lags Obama*, in *Pew Research Center*, October 2, 2018.

⁶⁶ *Cit.* Biographical data base of The Federal Judicial Center.

Trump appointed 36 women out of 153 or 24 percent throughout his third year.⁶⁷

Biden has indeed broken several records by choosing to diversify his judicial appointments. In fact, combining gender with race and ethnicity, women who are Black, Hispanic, Asian or part of another racial or ethnic minority group, account for 61 of 145, or 42 percent of the judges Biden had appointed by the third year in Office. No president has ever appointed a slate of judges consisting mostly of women, or racial and ethnic minorities than Biden. He has been truly impactful and trailblazing in appointing women to the federal judiciary. In fact, a statistical analysis of his appointees until 5 November 2023, reveals that two thirds of Biden's 145 judges were women and that women accounted for over 66 percent of the judges appointed. By comparison, Obama's 54 women judges or 47 percent of his total at the same time in his presidency that had been hailed as outstanding, pale by Biden's results that are truly impressive and will certainly impact on the future composition of the judiciary.⁶⁸ However, women are still underrepresented on the federal bench compared with their 50.4 percent share of the U.S. population.

5.2 Black

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From 1789 to 1949 all federal judges were white and, with the two exceptions already mentioned,⁶⁹ were all male. Harry S. Truman in 1949 was the first president to appoint the first African American, William H. Hastie, to the U.S. court of Appeals while the first African American to serve on the lower District court, James B. Parson, was appointed in 1961 by President Kennedy. The first African American woman, Constance B. Motley, was appointed to the District Court by President Lyndon B. Johnson in 1966 and the first appellate African American judge, Amalya L. Kearse, was appointed by President Carter in 1979.⁷⁰ From 1949 to 2023 (February 20) there have been 52 African American judges appointed to the Circuit courts of which 32 (62 percent) men and 20 (39 percent) women. As of February 20, 2023, of the 170 active Circuit court judges 25 (15 percent) are African American almost evenly split between men and women (13 the former and 12 the latter). From 1961 to 2023 (February 20) there have been 219 African Americans confirmed as U.S. District court judges of which 150 (68 percent) have been men and 69 (32 percent) have been women. As of February 20, 2023, of the 604 active District court judges 88 (15 percent) are African American: 48 are men and 40 are women.⁷¹

⁶⁷ Cit. J. Gramlich, *Trump has appointed a larger share of female judges than other GOP presidents, but lags Obama*.

⁶⁸ Cit. J. Gramlich, *Most of Biden's appointed judges to date are women, racial or ethnic minorities- a first for any president*.

⁶⁹ *Infra*, paragraph 5.1.

⁷⁰ For more on the subject see: B.J. McMillion, *The appointment of Black U.S. Circuit and District Court Judges: Historical Overview*, Congressional Research Services, February 21, 2023.

⁷¹ *Ibid*.

To put President Biden's groundbreaking appointments in perspective, as of February 20, 2023, he had appointed more African American appellate judges than any other president (13) and more Black women appellate judges (12) than all prior presidents combined (20) with a share of 60 percent. Biden, by that same date, had also appointed the fourth-greatest number of African Americans to District court judgeships (with a total of 21). And he is the only President for whom a majority of Black District court appointees are women, specifically 14 of 21 (67 percent).⁷² Biden's appointments rose the percentage of Black judges on the federal bench from 9.5 percent in 2020 to 11.5 percent as of Oct. 1, 2023. By contrast to Biden's achievements in this area, Presidents Obama and Clinton appointed more African Americans to District court judgeships than any other President, each with 53 Black District court appointees (45 percent of President Obama's Black appointees were women, while 25 percent of President Clinton's Black appointees were women). Whereas of all Republican presidents, George W. Bush appointed the greatest number of Black appellate judges (6) including the first Black woman appointed by a republican president. Furthermore, it is deemed important to specify that neither Trump nor Ford, Nixon or Eisenhower appointed Black Circuit judges.⁷³ Compared to the US population, Black Americans are still slightly underrepresented in fact, 11.5 percent of federal judges were Black as of Oct. 1, 2023, compared to 13.6 percent of the population.

5.3 Hispanic

The second largest "minority" group in the United States of America is the group recognized by the header of "Hispanic" that encompasses all those of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin. Hispanics were not acknowledged with judgeships for a very long time and in fact, it was only in 1961 that President Kennedy appointed Reynaldo Garzia, the first Hispanic District court judge. Judge Garzia was later elevated Circuit court judge by President Carter in 1979.⁷⁴ It was again up to Carter to be a groundbreaking president and appoint in 1980, the first Hispanic woman, Carmen Consuelo Cerezo, as District court judge while the first appointment to the Circuit court of a Hispanic woman did not occur before another eighteen years and in fact, President Clinton in 1998 appointed Kim McLane Wardlaw. In total there have been 26 Hispanic appointees to Circuit court judgeships of which seventy-three percent (19) men and twenty-seven percent (7) women.

Since 1961 and the groundbreaking appointment of Garzia up to September 15, 2023, there have been 149 Hispanic appointees to District court judgeships of which 103, or 69 percent, have been men and 46 or 31 percent have been women. As of the same date, 11 percent (69) of the 615

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ The procedure to elevate a judge must follow the same hurdles and uncertainties of a first-time nomination. The prior appointment to a lower judgeship is not a guarantee in obtaining the "consent" of the Senate and at times, presidents have had to withdrawal appointees because of a Senate filibuster or silent vetoes.

active District court judges were Hispanic with an almost even split between men (38) and women (31). President Biden is third, after George W. Bush and Obama for numbers of Hispanic appointees on the District courts, in fact, President Obama was the record-breaking president for appointing the greatest number of Hispanic District court judges (30), President George W. Bush appointed the second-greatest overall number (27) and the greatest number of Hispanic women to District court judgeships (11). Yet, President Biden is the only President for whom more than half of his Hispanic District court appointees have been women— specifically, 14 (64%) of 22. Similarly, Presidents Clinton and Obama each appointed 6 Hispanics to the Circuit court and each appointed 4 men and 2 women while President Biden appointed 5 Hispanics to the Circuit court by September 15, 2023, of which, 4 men and 1 woman,⁷⁵ thus raising by almost one percentage point the overall presence of this group on the federal bench, from a 6.5 percent in 2020 to 7.3 percent in 2023.

5.4 Asian American, Native Hawaiian, and Pacific Islanders

This group represents 7.3 percent of the population of the United States as of the last census held in 2020 when 19.900 million people so identified themselves, yet before 2021, they were extremely underrepresented on the federal bench. From 1789 to 1998 just 11 of the then 2,840 Article III judges fell into this group, and all 11 were men. In 1998 Bill Clinton appointed Susan Oki Mollway – a Hawaiian civil liberties lawyer of Japanese descent—as the first Asian American woman District court judge and only ten years later, in 2008, George W. Bush appointed Kiyoko A. Matsumoto the second woman Asian American District court judge. In the nation’s history, there have only ever been 91 Asian American-Native Hawaiian and Pacific Islanders (AANHPI) federal judges and President Biden has appointed nearly 40 percent of them. Indeed, Biden’s stride in appointing judges who recognize themselves as belonging to this ethnic group will be remembered as very impactful. In his first two years, President Biden appointed 12 Asian American women, two more than the 10 appointed by President Obama in eight years and more than double the number appointed during President Trump’s four years in office. By November 2023, Biden had appointed 36 AANHPI judges, including 24 women; the first AANHPI District court judges in six states; the first two Muslim Judges ⁷⁶and the first Native Hawaiian woman to serve on the bench of the District court of Hawaii. Only 21 AANHPI judges have ever served on a federal Circuit court, and President Biden has appointed more than a quarter (six) of them.

⁷⁵ For more see: B.J. McMillion. *The Appointment of Hispanic U.S. Circuit and District Court Judges: Historical Overview and Analysis*, Congressional Research Service, September 29, 2023.

⁷⁶ In 2016, President Obama had nominated Abid Riaz Qureshi to the U.S. District Court for the District of Columbia. Qureshi would have been the first Muslim American federal judge, but the Senate failed to confirm his appointment, and it was then up to Biden to appoint the first two Muslim, Zahid Nisar Quraishi (a Pakistani man, veteran and a criminal lawyer) and Nusrat Choudhury (a Bangladeshi American woman, and a lawyer for civil liberties)

5.5 Native Americans and other minorities

The first Native American federal judge took office in 1979. Before the Biden Administration, only four Native Americans and two others identified as partially Native American had ever served as federal judges. Those six judges represented just four-tenths of 1 percent of all federal judges. Nationally, 2.7 percent of the U.S. population claims Native American heritage, according to the Census Bureau.

In the first three years of the Biden Administration, four Native Americans have been appointed federal judges.⁷⁷ In fact, in June 2021, Judge Lydia Kay Griggsby became the first Native American Article III federal judge in Maryland, and Judge Lauren King—who also possesses significant experience in tribal law—became the first Native American lifetime judge in Washington State, and the first Muscogee Creek Nation citizen to serve in such a role. In 2022, Judge Sunshine Sykes became the first Native federal judge in California, and the first Navajo Nation citizen appointed to the federal bench. And in 2023, Biden appointed Sara E. Hill as a U.S. District judge for the United States District Court of Oklahoma. Hill, who is a citizen of the Cherokee Nation, is the first Native American woman confirmed for a lifetime judicial appointment in that State. Judge Hill is thus also the fifth active Native American Article III federal judge in the nation, and just the eighth Native federal judge ever appointed.

Two judges with known disabilities have been confirmed during the Biden Administration.⁷⁸ On July 13, 2022, President Biden nominated Jamal Whitehead to serve on the U.S. District Court for the Western District of Washington. The nomination of Mr. Whitehead, a Black civil rights lawyer, represented the kind of appointment that has become a hallmark of the Biden Administration: a nominee who would bring to the bench both underrepresented lived and professional experiences. Significantly, he was also the first nominee from this Administration known to be living with a disability. When now-Judge Whitehead, who uses a prosthetic leg, was confirmed in February 2023, he joined an extremely small number of federal judges known to be living with a disability. Seven months later, the Senate confirmed Judge Rita Lin to the U.S. District Court for the Northern District of California making her the second Biden appointee with a known disability. Judge Lin lost her hearing due to a childhood illness and has used hearing aids in both ears since age 5.⁷⁹ People with disabilities comprise at least 20 percent of the U.S. population, but very few federal judges have known disabilities.

In January 1994, President Clinton nominated Deborah Batts to the U.S. District Court for the Southern District of New York. Five months later, at a Pride celebration, she was sworn in as the first openly LGBTQ federal judge in the nation's history. President Biden has already named

⁷⁷ American Bar Association. *Diversity on the federal bench*. October 2023, at <https://www.abalegalprofile.com/>

⁷⁸ The Leadership Conference on Civil and Human Rights. *Judicial Diversity matters for equal justice*, updated July 17, 2024.

⁷⁹ The Leadership Conference on Civil and Human Rights, *Judges with disabilities - and Lawyers with disability -Rights Law experience- Belong on the Federal bench*, Court Resources, July 31, 2024.

twelve LGBTQ+ judges -one more than the eleven President Obama did over eight years - including the first three out lesbians ever to serve on a federal Circuit court.⁸⁰ Before the Biden Administration, only two LGBTQ people had ever served on federal Circuit courts. Not only do these judges bring their important lived experiences to the bench, but they also bring crucial professional expertise. Many of the LGBTQ judges nominated by President Biden have civil rights experience, including some who have specifically advocated for the rights of queer people.

Currently, there are 24 openly LGBTQ lifetime judges on federal courts and yet there are 870 Article III federal judgeships. While about 7 percent of adults in the United States identify as LGBTQ (this percentage gets higher for millennials and members of Gen Z), only 2.7 percent of the lifetime federal judgeships are held by openly queer people.

5.6 Professional diversity

Whether it is The Federalist Society or the American Bar Association to help the White House in vetting the candidates to a judgeship, for both, and for others who might be involved from time to time in the process, the lawyer population is the natural pool from which to choose. Thus, the diversity of the federal judiciary depends on a necessary binary diversity - ethnically and professionally - of the population of those who are in the legal profession.

As discussed above,⁸¹ for decades the appointees strongly represented the white and male population as a reflection of the lawyer population which, in turn, mirrored a largely misogynistic society. And for ever more the appointees were disproportionately dominated by former corporate attorneys and prosecutors. Presidents Carter, Clinton and Obama made a concerted effort to diversify the judiciary through both gender and ethnicity, yet those efforts regressed under the Trump's Administration.⁸² Consequently, Biden inherited from Trump a judiciary where 80 percent of all sitting judges was white, and 73 percent was male. By 2022 the federal bench was still largely white and male, but the effects of the forceful diversification espoused by Biden were already beginning to produce a tangible change, in fact, 70 percent of all sitting Article III federal judges were by then male, or down 3 points, while 78 percent were white, or down 2 points. As of October 2024, white federal judges represent 65.86 percent while the male judges are 60.19 percent. Since the Trump's Administration, in the time span of one term, Biden has succeeded to revert to inclusion and diversification by gender and race reducing the white and male representation of 14.14 percent and 12.81 percent points respectively.

One of the major obstacles in vetting even more minorities and higher shares of them to the federal bench is the objective disproportionality between the total population based on the census and the lawyer population. To fully evaluate the representation of a minority group within the judiciary,

⁸⁰ *Cit.* Judicial Diversity matters for equal justice.

⁸¹ *Infra* paragraph 5.1

⁸² D. Root, J. Faleschini, and G. Oyenubi, *Building a more inclusive Federal judiciary*, Center for American Progress Report, October 3, 2019.

two levels of information are needed: a) the total number and its share of the total, as declared in the census and b) the total number and its share of the total in the lawyer population. In fact, ABA has reported that of all federal judges, 32 percent are women who are still underrepresented compared with their 50.4 percent share of the U.S. population yet, not as poorly represented, if compared with their 39 percent of the lawyer population. Black judges are still a minority on the bench (11.5 percent), yet the disparity is not that relevant compared with the total of the population (13.6 percent) while they are overrepresented when compared to the 5 percent of the lawyer population. Similarly, it can be argued that Hispanic judges (7.3 percent) are under representative of their share of the U.S. population (19.1 percent) yet well represented compared to the 6 percent of the Hispanic lawyer population. Asian American judges are 3.6 percent of those on the federal bench, yet they are 6.3 of the population and 6 percent of all U.S. lawyers.⁸³

Additionally, a lacking professional diversity can also be detected in the selection of the appointees and thus the judiciary was dominated by former corporate lawyers and prosecutors. A 2016 study by the Alliance for Justice found that roughly 86 percent of judicial nominees under the Obama Administration had either worked as corporate attorneys, prosecutors, or both. At the same time, fewer than 4 percent had worked as lawyers at public interest organizations.⁸⁴ A 2017 Congressional Research Service report found that more than 46 percent of active federal Circuit court judges were either serving in private practice or as a State or local judge when they were appointed to the federal bench. In comparison, 7.5 percent were working as law professors, 3.7 percent were working for State and local government, and fewer than 1 percent were serving as a public defender. Among active District court judges, nearly 66 percent were either working in private practice or serving as a state or local judge. At the same time, only 3 percent were working for state or local government, 1.4 percent were serving as a public defender, and just 0.5 percent were working as a law professor when they were appointed.⁸⁵ And finally, the same lack of diversity is found in terms of educational background. Approximately 48 percent of all former and current federal judges graduated from one of 20 top law schools. Of those, nearly a quarter attended law school at Harvard University, Yale University, University of Michigan, University of Texas, or Columbia University.⁸⁶ Nowhere is this uniformity of educational background more to be found than among Supreme Court Justices, whereas over 30 percent of those who have served on the court graduated from just one law school: Harvard.

Biden's diversification has implied vetting, also and mostly, amongst public defenders, civil rights lawyers and criminal defense attorneys. Indeed, as of November 5, 2023, Biden had appointed more former public defenders

⁸³ *Cit.* American Bar Association. *Diversity on the federal bench*.

⁸⁴ Alliance for Justice, *Broadening the Bench: Professional Diversity and Judicial Nominations*, Washington: Alliance for Justice, 2016

⁸⁵ B.J. McMillion, *U.S. Circuit and District Court Judges: Profile of Select Characteristics*, Congressional Research Service, 2017.

⁸⁶ J. Iuliano, A. Stewart, *The New Diversity Crisis in the Federal Judiciary*, in 84 *Tenn. L. Rev.* 247 (2016).

in Circuit courts than any president.⁸⁷ Of the 213 Article III judges appointed by President Biden as of September 18, 2024, 86 of them had experience protecting civil and human rights. Yet to complete the diversification of the legal expertise there needs to be a concerted effort by the next Administrations to select more nominees who have significant experience in civil rights law such as economic justice, reproductive rights, LGBTQ equality, disability rights, and voting rights.⁸⁸ Furthermore, and notwithstanding Biden's successful efforts to diversify by gender, ethnicity and professional background there is a need to increase the shares of each group within the lawyer population and to increase the diversification of their legal professions and therefore a concerted effort by the minorities to improve the share of their legally educated population.

6. Conclusions

Biden's role in the exercise of the appointment power in the judiciary can be considered, in many ways and for many features, extremely impactful. The data alone speaks for itself, and the structured analysis attempted by this research may hopefully result useful for future researchers to evaluate the long - term effectiveness of his incisive approach and his contributions to the strengthening of the American Experiment through the federal judiciary. The last two presidencies and their influence on retaining and reinforcing or conversely weakening and destroying society through the judiciary, hopefully has taught the citizenry to pay more attention to all judicial nominations and not to be complacent bystanders. In the recent years, in fact, a concentrated effort has been made by Republican presidents, with the cooperation of Senator Mitch McConnell and of the Senate majority, to pack the District and Circuit courts with extreme, right-wing judges. Conversely President Biden, held faith to a campaign promise and thus almost equalized the numbers of judges appointed by his predecessor with those he appointed. His achievements are groundbreaking, as discussed in this paper, and analyses of the data available to date, reveal that the Biden Administration diversity approach appears to have been very successful, in fact, by September 26, 2024, he has appointed 213 of which 1 Supreme Court Justice, 44 Circuit court judges, 166 District court judges, 2 Court of International Trade judges. The 213 include 136 women, 129 people of color including Native Americans. Of these 213, 90 have significant experience protecting civil and human rights, including 43 public defenders plus similarly diversified 28 pending nominees. The 28 comprise 5 Circuit court judges and 23 District courts judges and embrace 19 women, 11 people of color including Native Americans and 13 who have significant experience protecting civil and human rights, including 6 public defenders. The struggle to achieve more inclusiveness within the federal judiciary will inevitably resent of the alternate fortunes of the major parties at the time of

⁸⁷ Cit. J. Gramlich, *Most of Biden's appointed judges to date are women, racial or ethnic minorities- a first for any president*, in *Pew Research Center*, December 4, 2023.

⁸⁸ Cit. The Leadership Conference on Civil and Human Rights. *Judicial Diversity matters for equal justice*, updated July 17, 2024.

the next presidential elections. Republican presidents have thus far demonstrated to be less willing to appoint judges who represent minorities and/or who are non-white women than Democratic presidents - from Carter onwards – who have undertaken a concerted effort to pursue inclusiveness and diversity. The enormous strides achieved by President Biden can either be an excellent foundation for Kamala Harris to improve upon, or it can be one more aspect of the present government to undergo the dismantling announced by Trump and advocated by the authors of Project 2025. Thus, while it is already possible to measure quantitatively the success of the Biden Administration's efforts to diversify the judiciary, the equally relevant effects of Biden's qualitative approach will be measurable only in the future.

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