



Why Biden’s judges are different — and what that means for the Supreme Court

Public defenders and civil rights lawyers, often kept out of the judiciary, have been front and center in Biden’s judicial picks.

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President Joe Biden’s judges are different.

Not only are they different from those of President Donald Trump, but Biden’s judicial nominees are different from those of any president before him.

In three ways, the first year of Biden’s judicial selections tells an important story about the effect the president is looking to have on the judiciary — a story that provides the clearest available information about how Biden will likely choose his first Supreme Court nominee.

First, the Biden administration, learning from the history of past Democratic administrations and from Biden’s own history on the Senate Judiciary Committee, has moved quickly on nominations — outpacing even the Trump administration’s quick judicial moves. In Biden’s first year in office, the Senate confirmed 13 appeals court nominees. Because the Supreme Court hears only a limited number of cases, these intermediate court judges have the final say over most cases in the federal courts.

In recent times, federal appellate court judges have also been the key group of people considered for Supreme Court vacancies. Of the current justices, only Justice Elena Kagan was not a federal appeals court judge when nominated for the Supreme Court. And, even in her situation, she was playing a key role in the judiciary, serving as the Obama administration’s solicitor general. (The administration’s top lawyer at the Supreme Court, the solicitor general is often referred to as “the tenth justice” due to the outsize role the lawyer plays in cases before the court.)

Second, Biden, expanding on then-President Barack Obama’s efforts to increase the demographic diversity of the courts, has chosen nominees with an eye toward making the

courts “look more like America,” as politicians often say. The Biden administration, in announcing appointments, regularly highlights nominees for their contributions to demographic diversity in the courts. In its end-of-year wrap-up touting its nominees, for example, the White House highlighted how Judge Lucy Koh — appointed to the 9th Circuit — would be the “first Korean-American woman to serve as a federal appellate judge.” Of the 13 appeals court nominees confirmed in Biden’s first year, only one is a white, non-Latino man. Ten are women, including five Black women, two Asian American women and one Latino woman. Two of the three men are Latino.

Given Biden’s pledge that his first Supreme Court nominee will be a Black woman, his decision to nominate several Black women to the federal appeals courts plays a dual role. The move adds voices to the appeals courts that have traditionally been left out or minimized, but it also brings more names into discussion for the Supreme Court. (Again, this is given modern practice to nominate federal appeals court judges to the Supreme Court — a tendency that has been criticized by some commentators.) This was seen in news coverage following Justice Stephen Breyer’s retirement announcement: In addition to Judge Ketanji Brown Jackson of the D.C. Circuit Court of Appeals, who has been considered one of the most likely picks since Biden first announced his pledge during the 2020 presidential campaign, three other appeals court appointees — Judges Candace Jackson-Akiwumi, Eunice Lee and Holly Thomas — have appeared on national media lists of possible Supreme Court nominees.

Third, while attention thus far has primarily been focused on Biden’s commitment to name the first Black woman to the Supreme Court, the other story that Biden’s judicial selections tell is about professional diversity. This experiential diversity may be less visible than demographic diversity, but it could have a big impact. As the libertarian Cato Institute’s Clark Neily testified in the House in 2021, “Among federal judges, former courtroom advocates for government outnumber former courtroom opponents of government by a ratio of seven to one.” Public defenders and civil rights and civil liberties lawyers — the lawyers who most often oppose the government in court — are dramatically outnumbered by prosecutors and the lawyers who defend government agencies and actions.

Before the Biden administration, it was generally accepted that the best path to becoming a federal judge included at least some time as a prosecutor. But favoring one side in the criminal legal system for judicial picks over decades has had consequences. Central criminal law-related questions — things like people’s Miranda rights against self-incrimination and the right to have illegally obtained evidence excluded from trial — have regularly been answered in recent decades in ways that benefit prosecutors and the government and limit the defendant’s ability to invoke those rights. As Dara Lind wrote in an extensive 2017 piece about the lack of criminal defense representation on the Supreme Court, “The real asset that former defenders bring to the judiciary, defense lawyers believe, is that they’re used to seeing the law from the perspective of those they represent — and thinking in terms of its flaws.”

There can be no question that Biden is trying to change that. In his first year, he more than doubled the number of federal appeals court judges across the country with significant experience as public defenders. Even that, though, is a far cry from evening out the experience on the bench. Before Biden took office, only three current federal appeals court judges had any

significant experience as public defenders — out of more than 150 appellate judgeships. Five of Biden's 13 confirmed appointees have public defender experience. Another three have significant civil rights experience. Just as notable is that only one of Biden's appellate nominees confirmed in his first year had experience as a prosecutor.

This may prove to be one of the key aspects of Biden's nomination to the Supreme Court, which currently counts three former prosecutors among its ranks and four others who have experience representing the federal government. By contrast, three of the Black women Biden has appointed to federal appeals court judgeships have experience as public defenders, including Jackson. While Jackson spent only a couple years as a federal defender, Jackson-Akiwumi and Lee spent almost all of their professional careers as defenders. The fourth, Thomas, has a civil rights background, having worked at the NAACP Legal Defense and Educational Fund. Her government service, moreover, was primarily in the Civil Rights Division at the Justice Department during the Obama administration.

What does all of that tell us about Biden's forthcoming Supreme Court nominee?

If Biden makes his Supreme Court pick the way he's been picking appellate judges thus far, Jackson will have the edge over California Supreme Court Justice Leondra Kruger, the other person considered most likely to be Biden's nominee. Jackson spent time as public defender, significant time at the U.S. Sentencing Commission and a few years at corporate firms, while Kruger spent most of her career before becoming a judge at corporate firms and the Justice Department.

Who else is being talked about? The White House has named only U.S. District Court Judge J. Michelle Childs, a South Carolina federal judge whose nomination for the D.C. Circuit is pending. Childs has the strong backing of Democratic South Carolina Rep. Jim Clyburn, a key Biden supporter, and has deep roots in the state, having worked at a corporate law firm in South Carolina and for state government before becoming a federal judge there. The other possibilities mentioned in national news coverage include several of Biden's other appellate nominees mentioned previously — Jackson-Akiwumi, Lee and Thomas — as well as North Carolina Supreme Court Justice Anita Earls, a civil rights lawyer before her election to the bench, and NAACP Legal Defense and Educational Fund President Sherrilyn Ifill.

Biden's ongoing effort to move judges quickly — and, obviously, to get a new justice confirmed — could give an advantage to people who already have gone through the confirmation process in the current Senate. Between Jackson and Kruger, that would help Jackson. Among others named, Jackson-Akiwumi, Lee and Thomas — all appeals court judges confirmed in the past year — would similarly benefit. And though Childs has not been confirmed for the D.C. Circuit judgeship to which Biden nominated her, her nomination to the appeals court means that she has recently gone through internal vetting and an FBI background check.

When it comes to professional diversity, Jackson would, again, appear to have the advantage over Kruger. Kruger's experience before being a judge echoes that of others on the court, while Jackson's experience, both as a public defender and with the Sentencing Commission, would

give her a perspective unlike those of her would-be colleagues. Kruger would, however, be the only member of the court to have state-court judicial experience. Almost all of the others mentioned as possible picks — Earls, Ifill, Jackson-Akiwumi, Lee and Thomas — have either a public defender or civil rights background currently unrepresented on the court. And though Childs has a background professionally similar to those of others on the court, her state-based experience would contrast with the D.C.-centric experience of most of the current justices and most of the other possible nominees.

Where does that leave things? Biden has only said that his Supreme Court nominee will be a Black woman and that her name will be announced by the end of February. Nonetheless, his judicial picks thus far strongly suggest a path Biden is seeking: a quickly confirmable nominee who would bring both demographic and professional diversity to the Supreme Court. The potential nominees being discussed only further solidify that thinking, as none of those named has ever worked in a prosecutor's office. All but two of them have experience in public defense or civil rights work. At the end of the day (or, by the end of the month), the most important take-away might be that the background and experience of the front-runner — Judge Ketanji Brown Jackson — fit perfectly with the mark Biden has already begun making on the judiciary.