



## **Biden judicial nomination train heading for purple and red states**

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WASHINGTON — The Democratic-controlled Senate has barreled President Joe Biden's judicial nominees down the confirmation track over the past year, and with the start of the new legislative session, it shows no signs of pumping the brakes.

But rising Republican opposition and the upcoming midterm elections threaten to slow the pace of seating judges of diverse backgrounds on the federal bench.

Biden had more of his judicial picks confirmed in 2021 than any president in his first year in office since Ronald Reagan. They included the first openly LGBT woman to sit on a federal circuit court; the first Muslim American federal judge in U.S. history; the first Asian American female district judge for the District of Columbia; and the first Black judge on the U.S. Court of Appeals for the Federal Circuit, according to the White House.

Three of those four judges are women, consistent with the sweeping diversity trends of Biden's 40 confirmed nominees: 78 percent were women and 53 percent were people of color.

That is a big contrast with his predecessor: 76 percent of Donald Trump's 226 confirmed judges were men and 85 percent were white. In comparison, President Barack Obama, with Biden as his vice president, made adding diversity to the federal benches a priority in his judicial selection process. Of Obama's more than 300 appointees, 64 percent were white — the lowest percentage

of any president before Biden — and 42 percent were women — the highest of any president pre-Biden, according to Alliance for Justice statistics.

Biden knows the confirmation process well. When he chaired the Senate Judiciary Committee, his current White House Chief of Staff, Ron Klain, served as his chief counsel from 1989 to 1992. As vice president, he also saw first-hand the difference in having your own party control the Senate confirmation process (from 2009 to 2015) and how that pace can slow to a crawl when the opposition controls the chamber, as Republicans did from 2015 to 2017 during the Obama administration.

The hundreds of lower district and circuit courts have the ultimate say in all but the several dozen cases the Supreme Court decides each year. Democrats argue that more diversity among judges in their professional and ethnic backgrounds means the judiciary will better represent the U.S. population.

Adding to the number

The number of confirmed judges is expected to climb to 41 this week when the Senate votes to seat Gabriel P. Sanchez on the U.S. Court of Appeals for the 9th Circuit.

Sanchez, who earlier in his judicial career was the first Latino to sit on the California Court of Appeal's First Appellate District, is the first of seven would-be circuit judges the White House already has teed up. Six of them would bring gender or racial diversity to the bench, including Biden's first nominee from a state with two Republican senators, Andre B. Mathis, a Black litigator from Memphis, Tenn., tapped for the U.S. Court of Appeals for the 6th Circuit. And looming over Democrats' goal to reshape the federal bench to better reflect the country's demographic mosaic is the possibility of the GOP winning back the Senate come November.

Mathis would be the first Black man (and second Black person) in Tennessee's seat on the 6th Circuit. His nomination "speaks to the demographic diversity that is still achievable at the circuit level in red states," a Senate Judiciary Democratic aide told CQ Roll Call.

Whether Tennessee's Republican senators, Marsha Blackburn and Bill Hagerty, ultimately return blue slips (a tradition under which home-state senators sign off on a blue form before the committee moves forward with a judicial nominee hearing) will have little bearing on Mathis' chances. In the 115th Congress, Chairman Charles E. Grassley, R-Iowa, abandoned the practice for circuit nominees.

This leaves the door open for Biden to continue to push through diverse circuit picks in swing and GOP states without Republican support. As for judicial vacancies at the district level, Democrats still plan to put forward nominees who bring new racial, gender and professional backgrounds to courts across the country.

"That's probably more true in purple than red states, because, of course, you have a Democratic senator who is really driving the train on the selection process," the Democratic aide said, referring to swing states, or purple states, with one Democratic and one Republican senator compared with red states represented by two Republicans or blue states by two Democrats.

But there are fewer purple-state seats open for Biden to fill. Three are vacant at the circuit level and 10 at the district level, compared with red states where five circuit judges and 19 district judges have retired, taken senior status (or announced plans to when a Biden nominee is named) or died.

Plus, there are still 11 circuit seats and 54 district seats to fill in blue states, and Democrats expect more vacancies to arise.

The White House showed no sign of slowing down on Jan. 3, when it resubmitted to the Senate three circuit court and 16 district court nominees, some of whom have already had committee hearings and votes, but were not confirmed by the end of the first session of the 117th Congress.

It is a formality mandated by Senate rules and means more paperwork for Democratic staffers. But it also signals a breakdown in comity between Senate Republicans and the White House.

In 2018, when Republicans controlled the White House and Senate, Democrats were “willing to play ball,” the same Democratic aide said, returning blue slips on 41 district court nominees. Democrats returned a total of 85 blue slips on the 168 nominees Trump appointed in his four years in office, even as the White House moved on circuit nominees over Democrats’ objections.

Republicans recall a different approach by Democrats on Trump’s nominations, giving insight into their possible game plan for Biden’s picks.

“Democrats used blue slips to hold open a significant number of district court seats for years,” Grassley spokesman Taylor Foy told CQ Roll Call in an email.

But Republican “no” votes on judicial nominees in the 117th Congress stand in contrast to Democrats’ willingness as the minority in the last Congress to favorably report by voice vote the less controversial of Trump’s nominees, typically to fill district court seats vital to the smooth functioning of the justice system.

By comparison, not a single judicial nominee advanced out of committee by voice vote last year. Republicans requested roll calls across the board.

Slow-walking nominees

Rising degrees of GOP opposition could mean serious slowdowns in committee for Biden’s judicial picks. The panel’s 11 Democrats and 11 Republicans could increasingly deadlock, requiring a motion to discharge a nominee to the floor from Senate Majority Leader Charles E. Schumer.

Republicans have said they expect Biden’s White House to loop them in on selecting district nominees for their states. Mike Davis, once Grassley’s chief counsel for nominations and now the president of The Article III Project, a group he founded to promote Trump’s judicial picks, said his former boss “wanted to ensure that there were documented communications between the [Trump] White House Counsel’s Office and the home-state senators.”

“If it was just telephone tag and not good faith consultation, that wasn’t good enough,” Davis said.

Now the ranking member on Judiciary, Grassley expects no different from the Biden White House. Foy, his spokesman, said that, as chairman, the Iowa Republican worked with the White House to ensure home-state senators were consulted ahead of any nominations, and current Chair Richard J. Durbin should do the same.

“He expects the Democrats to uphold that principle for senators from both parties. Republicans will continue to examine nominees for their ability, respect for the Constitution, fidelity to the law, integrity, temperament, and competence,” Foy added.

With the gavel in hand, Durbin could ignore honoring blue slips at the district level, like Grassley did at the circuit level.

But that would mean “a significant departure from the historic practice” that Democrats would likely come to regret, Grassley’s spokesman said.

“Grassley never proceeded with consideration of a district court nominee that did not have blue slips from both home-state senators, even in the face of great pressure from the Trump administration and others,” Foy added.

Would-be district judges tend to fly under the radar. Ilya Shapiro, vice president of the Cato Institute, a libertarian think tank, said that means scaling back home-state senators’ ability to weigh in on nominees may not be necessary.

“It’s not quite as political, and even in states that have two Republican senators, there can be compromises historically,” Shapiro said.

But progressives want Democrats to do whatever it takes — even bending committee tradition — to confirm judges who bring diversity to the federal bench.

Daniel L. Goldberg, legal director of the advocacy group Alliance for Justice, said he's confident "this was not just a one-off" and Biden's commitment to diversity will continue over the next three years.

"If Republicans blindly obstruct, do not negotiate in good faith, block demographically and professionally diverse nominees, then I think the expectation is that — for the functioning of our justice system — the Senate needs to confirm President Biden's eminently qualified jurists," Goldberg said.