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## CONFIRMING CANDACE JACKSON- AKIWUMI TO THE SEVENTH CIRCUIT

*Carl Tobias\**

On November 30, 2020, United States Court of Appeals for the Seventh Circuit Judge Joel Flaum professionally assumed senior status when he completed almost one half-century of robust public service as a preeminent jurist.<sup>1</sup> On the identical day, the United States Senate resumed the protracted lame duck session, which the Republican party upper chamber majority began *after* the voters throughout the country had distinctly elected President Joseph Biden to replace Donald Trump, yet seemingly retained an extraordinarily narrow Grand Old Party (GOP) chamber majority.<sup>2</sup> Because Judge Flaum had dutifully assembled a superb record of public service dedicated to enhancing the federal courts' operation—and the Seventh Circuit judicial membership lacked any individual of color when he assumed senior status—the process to fill the revered jurist's vacancy deserves scrutiny.

The first portion of this article briefly recounts federal court judicial selection throughout former President Trump's administration. The section detects that the chief executive and the pair of Republican Senate majorities in the 115th and 116th Congress rather easily nominated and relatively felicitously confirmed three extremely conservative, talented, and young Supreme Court Justices, fifty-four analogously conservative appellate court jurists and 174 comparatively similar district court judges by contravening, ignoring, or diluting longstanding re-

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\* Williams Chair in Law, University of Richmond School of Law. I wish to thank Margaret Sanner and Jamie Wood for valuable suggestions, Carley Schanck for valuable research, Ashley Griffin and Leslee Stone for excellent processing, *University of Illinois Law Review* Senior Online Editor Carly Ross for expeditious, careful editing, patience, flexibility, and sound advice, as well as Russell Williams and the Hunton Andrews Kurth Summer Endowment Research Fund for generous, continuing support. I assume complete responsibility for any errors that remain in this piece.

1. ADMIN. OFF. OF THE U.S. COURTS, CURRENT JUDICIAL VACANCIES (2020); see *Flaum, Joel Martin*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/judges/flaum-joel-martin> (last visited Aug. 1, 2021) [<https://perma.cc/G5R3-CMC3>] (documenting Judge Flaum's nearly half-century of valuable public service to the federal courts).

2. U.S. SENATE, CALENDAR (2020). Democrats earned the Senate majority in the 117th Congress when Jon Ossoff and Raphael Warnock challenged and defeated a pair of incumbent Republican senators to capture both Georgia U.S. Senate seats. Audra Burch, *Knocking on Two Million Doors in Georgia*, N.Y. TIMES, Jan. 3, 2021, at SM22; Astead Herndon & Rick Rojas, *Wins in Georgia Give Democrats Control of the Senate*, N.Y. TIMES, Jan. 7, 2021, at A1.

quirements, norms, and conventions, which had promoted the smooth, expeditious appointment of numerous exceptionally well-qualified, mainstream jurists. Segment two evaluates the procedures for nominating and confirming Judge Flaum's successor and how President Biden deftly proposed that nominee Candace Jackson-Akiwumi replace the distinguished jurist. Because she was a particularly well-respected, moderate nominee, section three proffers multiple suggestions for her rigorous, thorough Senate consideration and expeditious confirmation, which the chamber basically followed, and several recommendations for diligently nominating and professionally confirming additional stellar, centrist appellate court and district court aspirants who closely resemble Judge Jackson-Akiwumi, who duly received her commission as a judge of the Seventh Circuit on July 1.

#### I. JUDICIAL SELECTION IN THE TRUMP ADMINISTRATION AND JUDGE FLAUM'S VACANCY

2020 presidential and Senate voting proceeded after nearly four years in which Trump and the Grand Old Party chamber majority had appointed three exceptionally conservative, impressive, young Justices, more than fifty similar appeals court jurists, plus 174 relatively analogous district court judges.<sup>3</sup> The Republican President and Senate majority actually established distinctive records for court of appeals confirmations, dramatically filling the country's 179 appellate court positions for the initial time since President Ronald Reagan had served as the chief executive.<sup>4</sup>

Trump and the chamber discharged the important constitutional responsibilities to nominate and provide advice and consent on strong people by violating or modifying the strictures, traditions, and practices, which have long supplied numerous excellent, mainstream jurists. For instance, the President negligibly consulted senators from jurisdictions where empty posts materialized, although the senators are intrinsically familiar with substantially greater numbers of well-qualified persons who could be accomplished, centrist judges.<sup>5</sup> Trump also sharply confined American Bar Association (ABA) involvement with the process of judicial selection, even though Presidents after the 1950s—save George W. Bush and Trump—consistently depended on its meticulous examinations and pragmatic ratings.<sup>6</sup>

The Republican Senate majority failed to comprehensively assess very many of the appellate court and district court prospects whom former President Trump's White House submitted, nor did the GOP Judiciary Committee members robustly question massive numbers of designees in panel hearings or rigor-

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3. ADMIN. OFF. OF THE U.S. COURTS, JUDICIAL VACANCIES, CONFIRMATION LISTING (2017–2021).

4. JUDICIAL VACANCIES, CONFIRMATION LISTING (2019), *supra* note 3.

5. See Carl Tobias, *Keep the Federal Courts Great*, 100 B.U. L. REV. ONLINE 196, 206–07 (2020).

6. See Carl Tobias, *Selecting District Judges in the 116th Senate Lame Duck Session*, 37 YALE J. ON REG. NOTICE & COMMENT, notes 7–8 and accompanying text (2020).

ously deliberate about the merits of nominees' candidacies in committee discussions before votes.<sup>7</sup> Senator Chuck Grassley (R-IA), who served as the Committee Chair in the 114th and 115th Congress, also decided to manufacture a "circuit exception" from the "blue slip" idea during the latter Congress—which stricture permitted *each* senator who represents a jurisdiction with a court of appeals open position to curtail nominee scrutiny—although both the Democratic and Republican parties had definitely respected the slip convention throughout all eight years in Barack Obama's presidency, which comprised the most salient, applicable precedent.<sup>8</sup>

Candidate and President Trump constantly declared that he would "make the federal judiciary great again" principally by confirming multiple extremely conservative, able, relatively young Supreme Court Justices, significant numbers of exceptionally conservative, accomplished, and quite young appeals court jurists, as well as three times as many highly conservative, talented, young district court judges.<sup>9</sup> Senator Mitch McConnell (KY), the Grand Old Party Senate Majority Leader, insured that the chamber rapidly processed nominees for appellate court vacancies, while McConnell incessantly asserted that his 2020 refrain was "leave no vacancy behind."<sup>10</sup> The phenomena evaluated have threatened—and even jeopardized—multiple crucial diversity indicia in terms of ethnicity, gender, sexual orientation, ideology, and experience on the federal bench; the nomination and confirmation practices; and citizen regard for the selection process, the judiciary, the presidency, the Senate, and the Rule of Law. Those concerns distinctly portended that Trump might have chosen to nominate—and the Republican Senate majority could have decided to establish a process and smoothly confirm—Judge Flaum's Seventh Circuit successor ahead of the Biden inauguration.

Filling the prominent jurist's open seat would have been misguided for numerous trenchant reasons. Many effective commands, traditions, and procedures demonstrate why Trump properly refrained from directly suggesting a replacement for Judge Flaum. Peculiarly significant, Trump ought to have decidedly

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7. 163 CONG. REC. S8,022–24 (daily ed. Dec. 14, 2017) (statements of Sens. Feinstein & Leahy); *see* Tobias, *supra* note 5, at 214–15.

8. Senator Grassley, as the Judiciary panel Chair, decided that the committee would retain the district court blue slip policy during the 114th and 115th Congress. Senator Lindsey Graham (R-SC), who replaced Grassley as the Judiciary Committee Chair in the 116th Congress, retained Grassley's blue slip approach for appellate courts and district courts. Carl Tobias, *Senator Chuck Grassley and Judicial Confirmations*, 104 IOWA L. REV. ONLINE 31, 54–55 (2019); *see* Tobias, *supra* note 5, at 213 (documenting Graham's retention of the appellate court and district court blue slip approach that Grassley had previously created and implemented); Tobias, *supra* note 6, at notes 19–20 and accompanying text.

9. Carl Tobias, *Filling the Federal District Court Vacancies*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 421, 427 (2020).

10. Chris Cioffi, *McConnell: 'We're Going to Clean the Plate on Judges'*, ROLLCALL (Oct. 30, 2020), <https://www.rollcall.com/2020/10/30/mcconnell-senate-judges-lame-duck/> [<https://perma.cc/5ZHD-KVUN>]; *see* Alex Swoyer, *Senator Mitch McConnell on Judges: My Motto is 'Leave No Vacancy Behind,'* WASH. TIMES (Feb. 11, 2020), <https://www.washingtontimes.com/news/2020/feb/11/mitch-mcconnell-judges-my-motto-year-leave-no-vaca/> [<https://perma.cc/K684-6HRP>]. *But see* CURRENT JUDICIAL VACANCIES (2021), *supra* note 1 (documenting the failure of former Republican President Trump and GOP Senate Majority Leader McConnell to leave no vacancy behind).

rejected proposing a nominee in deference to the record-breaking 81 million voters who in fact clearly and emphatically spoke by choosing a new President in November 2020.<sup>11</sup> Biden's abundant margin of victory suggests that the citizenry amply trusts his comprehensive, ardent fulfillment of the constitutional duty to recruit, examine, designate, and confirm Article III judges.<sup>12</sup> Had lame duck President Trump insisted on marshaling a nomination at his tenure's end, the chamber should have respectfully declined to review a pick across the lame duck session principally because drastically-limited time remained for the Senate to carefully discharge its fundamental constitutional responsibility for providing advice and consent.<sup>13</sup>

## II. THE PROCESS FOR SELECTING JUDGE FLAUM'S SUCCESSOR

On March 30, 2021, President Biden carefully announced that he intended to nominate the first slate of prospects, comprising eleven well-qualified, moderate nominees, who are particularly diverse in terms of ethnicity, gender, sexual orientation, ideology, and experience.<sup>14</sup> For instance, the package encompassed three Black women for the Courts of Appeals, two of whom had conscientiously represented numerous defendants accused of crimes—although Trump could not manage to proffer a single Black appellate court nominee—the initial Muslim Article III nominee, and many other extraordinarily qualified, mainstream nominees.<sup>15</sup> Most relevant in this piece was the Biden White House's astute decision

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11. Domenico Montanaro, *President-Elect Joe Biden Hits 80 Million Votes in Year of Record Turnout*, NPR (Nov. 25, 2020), <https://www.npr.org/2020/11/25/937248659/president-elect-biden-hits-80-million-votes-in-year-of-record-turnout> [<https://perma.cc/FDM9-B3CU>].

12. U.S. CONST., art. II, § 2.

13. The days that remained in the 2020 lame duck session were insufficient in number for the Federal Bureau of Investigation to undertake a comprehensive background check, for the Judiciary Committee to conduct a thoroughgoing investigation, convene a rigorous hearing that extensively questioned the nominee, and orchestrate a complete discussion of the nominee's qualifications ahead of a committee ballot, and for the chamber to convene a comprehensive, robust floor debate before a confirmation vote. *But see* 166 CONG. REC. S7,492 (daily ed. Dec. 15, 2020) (documenting the confirmation of Seventh Circuit Judge Thomas Kirsch—whom former President Trump managed to nominate in mid-November for the appeals court vacancy created by Justice Amy Coney Barrett's Supreme Court elevation and the Republican Senate majority rapidly confirmed in mid-December—to the appellate court during that lame duck session).

14. White House, Office of the Press Secretary, *President Biden Announces Intent to Nominate 11 Judicial Candidates*, Mar. 30, 2021; Carl Hulse & Michael Shear, *Biden's First Round of Judicial Picks Reflects His Diversity Pledge*, N.Y. TIMES, Mar. 31, 2021, at A14. Biden has subsequently announced five additional packages, which encompass nominees who strongly resemble those individuals whom the President recommended in the first slate. *See* White House, Office of the Press Secretary, *President Biden Announces Second Slate of Judicial Nominees*, Apr. 29, 2021; *id.*, *President Biden Announces Third Slate of Judicial Nominees*, May 12, 2021; *id.*, *President Biden Announces 4th Slate of Judicial Nominees*, June 15, 2021; *id.*, *President Biden Names Fifth Round of Judicial Nominees*, June 30, 2021; *id.*, *President Biden Names Sixth Round of Judicial Nominees*, Aug. 5, 2021; *see also id.*, *Statement by President Joe Biden on the First Confirmations of His Judicial Nominees*, June 8, 2021.

15. For former President Trump's consummate failure to nominate a single Black individual to any court of appeals vacancy, *see* S. Judiciary Comm., *Hearing on Nominees*, Apr. 28, 2021 (statement of Sen. Durbin); Lynn Sweet, *Lack of 7th Circuit Diversity Highlighted at Candace Jackson-Akiwumi Hearing*, CHI. SUN-TIMES (Apr. 29, 2021), <https://chicago.suntimes.com/columnists/2021/4/28/22408732/jackson-akiwumi-senate-confirmation-hearing-would-be-rare-judge-public-defender> [<https://perma.cc/LZW6-YM95>]; *see also* sources cited

to nominate Candace Jackson-Akiwumi for Judge Flaum's Seventh Circuit vacancy.

Biden chose Jackson-Akiwumi during late March, but the process that ultimately culminated in her nomination had actually commenced substantially earlier.<sup>16</sup> Indeed, throughout practically all of 2020, Biden carefully assembled a very experienced, professional judicial selection transition team, which enabled the individual who eventually became President to cautiously prepare for the appointments process and to survey manifold particular candidates ahead of the presidential inauguration. By the summer of 2020, the team had carefully established venerable, thorough appointments practices, while the staff identified a substantial number of highly capable potential submissions. After Biden had captured election, the official transition process started. Most pertinently, Dana Remus, the White House Counsel Designate, wrote a December 22, 2020 letter to plentiful senators, which requested that politicians from states which had encountered plentiful vacancies suggest picks for nominees, who manifested diversity vis-à-vis ethnicity, gender, sexual orientation, ideology, and experience, before January 20, and that senators who represent jurisdictions that encounter openings subsequently tender prospects within forty-five days of the vacancies' creation.<sup>17</sup>

Senator Richard Durbin (D-IL)—who became the new Chair of the Senate Judiciary Committee when the Senate finally reached an unusually late organizational agreement in the 117th Congress during February—<sup>18</sup> had recruited Jackson-Akiwumi for Judge Flaum's unoccupied position, while the senator's employees had initially contacted the prospective nominee around December's conclusion.<sup>19</sup> Incoming White House Counsel Office lawyers approached Jack-

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*supra* note 2, *infra* note 34. Indeed, President Biden has already nominated, and the Senate has smoothly confirmed, four excellent Black women to serve as appellate court judges across his short tenure. See CONFIRMATION LISTING (2021), *supra* note 3.

16. I rely substantially in this paragraph and somewhat throughout the remainder of this piece on Ian Millhiser, *Biden's Fight to De-Trumpify the Courts, Explained*, VOX (July 30, 2021), <https://www.vox.com/22587059/joe-biden-courts-judicial-nominations-donald-trump-supreme-court-barack-obama> [<https://perma.cc/Q32U-HYQX>]; Zoe Tillman, *Trump Transformed the Federal Courts. Here's How Biden Could*, BUZZFEED NEWS (Dec. 17, 2020), <https://www.buzzfeednews.com/article/zoetillman/trump-judges-appoint-biden-courts> [<https://perma.cc/G62H-PMGX>]; Matt Viser & Ann Marimow, *Biden Moves to Quickly Make His Mark on Federal Courts, After Trump's Record Judicial Nominations*, WASH. POST (Feb. 3, 2021), [https://www.washingtonpost.com/local/legal-issues/biden-judge-nominations/2021/02/02/e9932f3a-6189-11eb-9430-e7c77b5b0297\\_story.html](https://www.washingtonpost.com/local/legal-issues/biden-judge-nominations/2021/02/02/e9932f3a-6189-11eb-9430-e7c77b5b0297_story.html) [<https://perma.cc/5YAK-9QMX>].

17. Letter from Dana Remus, White House Counsel Designate, to U.S. Senators, Dec. 22, 2020; see Madison Alder, *Biden Deadline for Judicial Nominees Challenges Senate Democrats*, BLOOMBERG LAW (Apr. 23, 2021), <https://news.bloomberglaw.com/us-law-week/biden-deadline-for-judicial-nominees-challenges-senate-democrats> [<https://perma.cc/L664-22ZV>]; Jennifer Bendery, *Biden Team Tells Senate Democrats to Send Him Judicial Nominees ASAP*, HUFFINGTON POST (Dec. 30, 2020), [https://www.huffpost.com/entry/joe-biden-courts-progressive-nominees\\_n\\_5fecc527c5b6e7974fd18321](https://www.huffpost.com/entry/joe-biden-courts-progressive-nominees_n_5fecc527c5b6e7974fd18321) [<https://perma.cc/N7RP-WCDT>].

18. See S. Res. 27, 117th Cong., Feb. 3, 2021; see also *infra* note 28.

19. S. Judiciary Comm., Questionnaire and Responses of Candace Jackson-Akiwumi, Apr. 28, 2021; see Lynn Sweet, *Jackson-Akiwumi, Nominee for Chicago Federal Appeals Court, Would Be Rare Judge Who Was*

son-Akiwumi on January 11 and 12, while employees from this office interviewed the proposed nominee several weeks later.<sup>20</sup> President Biden and White House Counsel Remus duly met with the candidate at the White House concerning the nomination relatively soon thereafter, while Biden essentially clarified his intent to efficaciously muster Jackson-Akiwumi's nomination with the March 30 announcement, which preceded the candidate's April 19 official nomination.<sup>21</sup>

Candace Jackson-Akiwumi clearly was an exceptionally-qualified, centrist possibility.<sup>22</sup> She had graduated from Princeton University in 2000 and the Yale Law School during 2005, after which she clerked for presently-retired Northern District of Illinois Judge David Coar and the current Fourth Circuit Chief Judge Roger Gregory. Once Jackson-Akiwumi had carefully finished her clerkships, she practiced litigation with the Chicago office of the Skadden, Arps law firm over multiple years.

The candidate then joined the Northern District of Illinois Federal Public Defender Office that rigorously serves the populace of the Northern District. Across ten years, Candace Jackson-Akiwumi "represented 400 clients accused of federal crimes at every stage of the process, from investigation to trial and pre-trial proceedings, sentencing, and appeal;" in considerable litigation, "ranging from fraud to firearms, [the Biden nominee] successfully advised grand jury witness appearances, negotiated pleas, achieved hundreds of mitigated sentences and [conducted] seven federal trials" while briefing and arguing five appeals before the Seventh Circuit.<sup>23</sup> Jackson-Akiwumi's singular attainment was contesting the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives practice of creating fake drug stash homes and "bringing these cases largely against African-American and Latino defendants;" her creative representation directly resulted in the Northern District United States Attorney's Office's significant determination to change the policy.<sup>24</sup> She recently became a partner at Zuckerman Spaeder in Washington, D.C, where Jackson-Akiwumi's practice emphasized complex civil litigation, investigations, and white collar criminal defense endeavors.<sup>25</sup>

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*Criminal Defense Lawyer*, CHI. SUN-TIMES (Apr. 28, 2021), <https://chicago.suntimes.com/columnists/2021/4/27/22406747/jackson-akiwumi-nominee-chicago-federal-appeals-court-will-be-rare-judge-was-criminal-defense-lawyer> [<https://perma.cc/ZH8J-TXKR>].

20. See sources cited *supra* note 17.

21. White House, Office of the Press Secretary, Nominations Sent to the Senate, Apr. 19, 2021; see sources cited *supra* notes 16, 19; President Biden Announces Intent..., *supra* note 14; *infra* note 30.

22. I rely substantially in this paragraph on sources cited *supra* note 21.

23. In the "hundreds of cases where clients ultimately chose not to go to trial or appeal their conviction or sentence, [Jackson-Akiwumi] evaluated and advised on potential trial [and] appellate issues throughout [cases'] pre-trial, trial, and sentencing phases." She also "drafted and argued [many] substantive motions [to] dismiss and suppress [and] litigated hundreds of contested hearings, ranging from bond" to revocation, suppression, and sentencing, hearings. Sweet, *supra* note 19.

24. Sweet, *supra* note 19; see Harsh Voruganti, *Candace Jackson-Akiwumi – Seventh Circuit Nominee*, THE VETTING ROOM (May 3, 2021), <https://vettingroom.org/2021/05/03/candace-jackson-akiwumi/> [<https://perma.cc/45FB-Y5L9>].

25. President Biden Announces Intent..., *supra* note 14.

The 117th Senate apparently organized the chamber somewhat later than the Senate ordinarily does for several important reasons. Considerable delay seemingly arose from the runoff elections that involved a pair of Georgia United States Senate seats held by two Republican incumbents—which Jon Ossoff and Raphael Warnock captured—which yielded a razor-thin Democratic chamber majority.<sup>26</sup> Congress also did manage to certify the presidential election on January 6, which election-defeat Trump persistently relitigated in federal and state court lawsuits pursued around the country and through television, print, radio, and social media, while the Capitol’s storming acutely disrupted both houses of Congress and probably slowed efforts to reorganize the upper chamber.<sup>27</sup> In fact, the Democratic and Republican parties were only able to consummate the organizational agreement, which provided for the Judiciary Committee to be evenly divided with eleven Democratic members and eleven Republican members, in early February.<sup>28</sup>

When Durbin assumed the Judiciary Committee chairmanship, he vowed to fairly, efficiently, and transparently lead the panel while facilitating substantial, robust participation.<sup>29</sup> However, Durbin as chair and the Democratic chamber majority clearly admonished Senate Republicans that different standards would *not* govern the respective parties, by stating, for instance, that the Democrats planned to retain the GOP “circuit exception” from the blue slip policy, which Grassley had earlier created.<sup>30</sup>

The White House dutifully and speedily compiled the relevant paperwork, while President Biden officially marshaled the submission of ten nominees—who included most pertinently Jackson-Akiwumi—for the chamber during mid-

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26. See sources cited *supra* note 2.

27. See Laura Litvan, *Biden Cabinet Risks Slow Start With Lag In Senate Confirmations*, BLOOMBERG LAW (Jan. 13, 2021), <https://www.bloomberg.com/news/articles/2021-01-13/biden-to-start-with-interim-cabinet-as-hearings-stall-in-senate> [<https://perma.cc/SK3Z-LP9G>]; see also Sarah Binder, *McConnell and Schumer Ended Their Standoff Over the New Senate. Who Won and What Happened?*, WASH. POST (Jan. 26, 2021), <https://www.washingtonpost.com/politics/2021/01/26/mcconnell-schumer-ended-their-standoff-over-new-senate-who-won-what-happened/> [<https://perma.cc/YD8M-EMYJ>]. See generally Dmitriy Khavin et al., *Day of Rage*, N.Y. TIMES, Special Section, (Aug. 15, 2021), <https://www.nytimes.com/video/us/politics/100000007606996/capitol-riot-trump-supporters.html> [<https://perma.cc/WM8U-Y3E2>].

28. S. Res. 27, 117th Cong., Feb. 3, 2021; see Binder, *supra* note 27. One important consequence of having Judiciary Committee membership that is equally divided between Democrats and Republicans is that panel tie approval votes regarding executive branch and judicial nominees and legislative matters trigger a complicated process to secure floor consideration. The Committee Chair must transmit notice of the votes to the Secretary of the Senate that must be printed in the Congressional Record, after which the Majority or Minority Leader may proffer a motion to discharge the matter, once there has been “consultation with the Chairman and Ranking Member.” S. Res. 27, *supra*. The Senate Resolution then mandates that the Senate allow four hours of debate before the chamber votes on the motion, which consumes scarce floor time. See *infra* note 52 (providing examples of President Biden’s upper-echelon executive branch nominees who received tie committee votes and subsequent confirmation).

29. Carl Hulse, *A Warning to the GOP: Don’t Block Judges*, N.Y. TIMES, Mar. 2, 2021, at A17.

30. *Id.*; Marianne Levine, *Senate Dems Take a Page From GOP in Judicial Nominee Battles*, POLITICO (Feb. 17, 2021), <https://www.politico.com/news/2021/02/17/court-nominees-democrats-469500> [<https://perma.cc/A84S-2636>]; see *supra* note 8 and accompanying text.

April.<sup>31</sup> The panel staff rapidly circulated thorough questionnaires to the nominees, who diligently mustered salutary, comprehensive, responsive answers.<sup>32</sup> The committee posted notice of the April 28 hearing seven days before the session convened and of the identities of the multiple nominees who would be testifying before the panel forty-eight hours after the panel had tendered the earlier notice.<sup>33</sup>

Judiciary Committee Chair Durbin opened the hearing by recognizing that it was an “historic day,” because every pick marshaled is a nominee of color, while he proclaimed that the selections represented meaningful “demographic and professional diversity.”<sup>34</sup> Then-D.C. District Court Judge Ketanji Brown Jackson—a very accomplished, mainstream D.C. Circuit nominee, whom President Obama had appointed to the district bench in 2013 and seriously considered for Justice Antonin Scalia’s vacant post in 2016—and Candace Jackson-Akiwumi supplied thorough, cogent, and responsive testimony on the first panel, and three highly experienced, moderate district court nominees Julien Neals, Zahid Quraishi and Regina Rodriguez, whom Grand Old Party members simply did not ask any questions, comprised the second panel.<sup>35</sup> Republican senators posed

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31. The White House announced that President Biden intended to, and the White House actually did, nominate D.C. Superior Court Judge Florence Pan to the D.C. District Court vacancy which Judge Ketanji Brown Jackson’s elevation to the D.C. Circuit created. Nominations Sent to the Senate, *supra* note 21; see President Biden Names Fifth Round..., *supra* note 14; 167 CONG. REC. S4,511 (daily ed. June 14, 2021) (Judge Jackson’s confirmation).

32. Jackson-Akiwumi’s prompt answers were particularly comprehensive and responsive. See Questionnaire and Responses of Candace Jackson-Akiwumi, *supra* note 19. However, all five of the initial nominees swiftly provided thorough and responsive answers.

33. S. Judiciary Comm., Hearing Advisory, Senate Judiciary Comm. to Hold Hearing on First Slate of White House Judicial Nominations, Apr. 23, 2021. When the Grand Old Party maintained a Judiciary Committee majority throughout the previous six years, Republicans rarely posted nominee names before the week of the hearings. See Tobias, *supra* note 5, at 211–17.

34. Durbin expressly praised President Biden—who has already confirmed four Black women to appellate courts, even though fewer than ten had preceded them—for promoting diversity on the bench and chastised Trump for failing to name one Black appellate court judge: “It is a sad reality that four years of President Trump and a Republican Senate did not expand diversity on our federal courts.” *Hearing, supra* note 15; see Carl Tobias, *President Donald Trump’s War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531 (2019); Sweet, *supra* note 15; *infra* note 48.

35. President Biden recommended the initial two district court nominees for the District of New Jersey, which had long experienced six emergencies in seventeen active judgeships for which former President Trump failed to recommend a single nominee throughout his four years as chief executive. JUDICIAL VACANCIES, EMERGENCIES (2021), *supra* note 1; see Tracey Tulley, *In New Jersey, Empty Benches Hinder Justice*, N.Y. TIMES, Mar. 17, 2021, at A1. Julien Neals and Regina Rodriguez, who also filled an emergency opening in Colorado, had been among dozens of President Obama’s nominees whom the Republican Senate majority refused to confirm during the 114th Congress. JUDICIAL VACANCIES, EMERGENCIES, *supra*; White House, Office of the Press Secretary, Presidential Nominations Sent to the Senate, Feb. 26, 2015 (Julien Neals); *id.*, Apr. 28, 2016 (Regina Rodriguez). District of New Jersey Magistrate Judge Zahid Quraishi has become the initial Muslim federal district court judge. CONFIRMATION LISTING (2021), *supra* note 3; Azi Paybarah, *Senate Confirms First Muslim Federal District Judge*, N.Y. TIMES, June 12, 2021, at A15. *But see* Aymann Ismail, *A Biden Judge Would Be the First-Ever Muslim on the Federal Bench. Some Muslims Are Furious*, SLATE (Apr. 27, 2021), <https://slate.com/news-and-politics/2021/04/zahid-quraishi-muslim-federal-judge-criticism.html> [<https://perma.cc/UKS4-3FDK>]. Republican senators apparently did not pose questions to the three highly qualified, mainstream district court nominees, because the members focused their attention on questioning the appellate court nominees. See Andrew Kragie, *Biden’s Appellate Picks Tackle GOP Queries on Race, Politics*,



many challenging queries for the initial panel constituting Judge Jackson and Candace Jackson-Akiwumi to each specific appellate court nominee; however, more questions probed Judge Jackson, because numerous astute observers have long considered the D.C. Circuit to be the country's second most important tribunal and numbers of highly regarded commentators have suggested that President Biden will probably nominate the jurist to the first High Court empty slot that he fills.<sup>36</sup>

The Judiciary Committee hearing lacked the strident partisanship that apparently characterized Republican public hearing inquiries for some of Biden's mainstream, high-level executive branch nominees and certain of the President's judicial nominees as well as queries that Democrats propounded to many controversial Trump upper-echelon executive branch nominees and judicial nominees.<sup>37</sup> However, multiple Republican panel members did stress the Biden appellate court nominees' defense of persons accused with crimes in seeming attempts to discredit Jackson-Akiwumi and Judge Jackson. For example, Senator Grassley, who became the Judiciary Committee Ranking Member in the 117th Congress, directly questioned Jackson-Akiwumi respecting her defense of a putative gun trafficker charged for buying weapons from one Indiana seller plus eventually selling them again illegally to a Chicago purchaser.<sup>38</sup> The nominee repeatedly advised the committee members that she was dutifully proffering the representation to which defendants accused of crimes are entitled in the federal court justice regime.<sup>39</sup>

When Senate Grand Old Party committee members distinctly sought Jackson-Akiwumi's perspective regarding what effects race might have on court decisionmaking, she respectfully and carefully answered: "I don't believe race will play a role in the type of judge I would be if confirmed."<sup>40</sup> However, Jackson-Akiwumi expressly claimed that "demographic diversity of all types" performs a significant role by enlarging "public confidence in our courts" and enhancing citizen acceptance of judicial determinations' legitimacy.<sup>41</sup> The nominee concomitantly elaborated that realizing improved diversity supports role modeling

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LAW360 (Apr. 28, 2021), <https://www.law360.com/pulse/articles/1379211/biden-s-appellate-picks-tackle-gop-queries-on-race-politics> [<https://perma.cc/3KYQ-3ZNC>].

36. Carl Hulse, *Senate Weighs First Biden Court Picks, All People of Color*, N.Y. TIMES, Apr. 29, 2021, at A17; Ann Marimow, *Biden Judicial Pick Ketanji Brown Jackson Defends Her Independence in Senate Hearing*, WASH. POST (Apr. 28, 2021), [https://www.washingtonpost.com/politics/judge-ketanji-brown-jackson-defends-independence-in-senate-hearing/2021/04/28/ea4015c8-a794-11eb-8d25-7b30e74923ea\\_story.html](https://www.washingtonpost.com/politics/judge-ketanji-brown-jackson-defends-independence-in-senate-hearing/2021/04/28/ea4015c8-a794-11eb-8d25-7b30e74923ea_story.html) [<https://perma.cc/GE8B-4KXG>].

37. *Hearing*, *supra* note 15; *see* sources cited *supra* notes 28, 36; *see also infra* note 51 and accompanying text.

38. *Hearing*, *supra* note 15; *see* Hulse, *supra* note 36.

39. She remarked "I stand by my commitment and the oath I took as an attorney, which is to represent zealously everyone who requires federal representation in our federal courts. That's how our system works best." *Hearing*, *supra* note 15.

40. *Hearing*, *supra* note 15; Hulse, *supra* note 36; Sweet, *supra* note 15.

41. *Hearing*, *supra* note 15; *see* Hulse, *supra* note 36; Sweet, *supra* note 15.

for young practitioners and students who can aspire to be involved in public service.<sup>42</sup> When Grand Old Party legislators sought her perspectives related to the possible expansion of the Supreme Court and regarding particular Supreme Court precedents, Jackson-Akiwumi properly and respectfully declined to respond.<sup>43</sup>

### III. SUGGESTIONS FOR RIGOROUSLY ANALYZING AND CONFIRMING JACKSON-AKIWUMI AND FOR ROBUSTLY NOMINATING AND CONFIRMING MORE EXCELLENT JUDGES

At the hearing's conclusion, Chair Durbin followed the customary practice of announcing that committee members possessed one week within which they could submit written questions for the record (QFR); the Chair provided seven days within which the judicial nominees could muster written answers.<sup>44</sup> All five of the nominees—particularly Candace Jackson-Akiwumi, because she has duly joined the court of last resort for practically all matters filed with Illinois, Indiana, and Wisconsin district courts in the Seventh Circuit, as the High Court entertains such a minuscule number of appeals—promptly submitted comprehensive, responsive, and cautious answers.<sup>45</sup>

Durbin listed appellate court nominees Judge Jackson and Ms. Jackson-Akiwumi and district court nominees Neals, Quraishi, and Rodriguez—who testified in the April 28 committee hearing—for the initial time on the May 13 notice respecting a weekly Executive Business Meeting that usually analyzes, discusses, and casts ballots on, several judicial nominees.<sup>46</sup> Grand Old Party senators requested that panel consideration of the nominees be directly held over for one week, as the committee rules clearly state and has been the prerogative

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42. *Hearing, supra* note 15; *see Hulse, supra* note 36; *Sweet, supra* note 15.

43. *Hearing, supra* note 15; *see Hulse, supra* note 36; White House, Office of the Press Secretary, Exec. Order on the Establishment of the Presidential Commission on the Supreme Court of the United States, Apr. 9, 2021; Charlie Savage, *Biden Panel on Changes to Supreme Court Is Said to Have a Broad Portfolio*, N.Y. TIMES, Apr. 16, 2021, at A17; Charlie Savage, *Judicial Panel Considers Reducing Supreme Court's Power to Strike Down Laws*, N.Y. TIMES, July 1, 2021, at A18. Jackson-Akiwumi analogously and properly declined to express her perspectives regarding particular legal issues that she might subsequently need to address as a judge, were the Senate to confirm her). *Hearing, supra*.

44. *Hearing, supra* note 15. QFRs should be rigorous, and the queries usually probe issues that members did not have an opportunity to fully address in the hearing or matters for which members request nominee elaboration. Most of these questions are less effective than queries asked during committee hearings, because nominees possess considerable time in which to formulate responses, unlike hearing questions to which they must quickly respond.

45. In the 2019 Supreme Court Term, the Justices issued fifty-three signed opinions. CHIEF JUSTICE JOHN ROBERTS, YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2020). In 2020, the Seventh Circuit issued 463, and all of the courts of appeals' 3,631, published opinions. JUDICIAL BUSINESS OF THE U.S. COURTS, U.S. COURTS OF APPEALS-TYPE OF OPINION OR ORDER FILED IN CASES TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2020 (2020).

46. These dates reflect the Judiciary Committee's rules, but the timing may have been delayed an extra week, because the Senate recessed the week of May 3 for a state work period. *See* S. Judiciary Comm., Rule I (2021); SENATE CALENDAR (2021).

and the systematic practice of the panel minority—both Democratic and Republican.<sup>47</sup>

Throughout this panel meeting, the committee seemingly probed and deliberated regarding several issues which are pertinent to efficacious nominee federal court service. For instance, Grassley declared that GOP members should hold court of appeals “nominees to a high standard of constitutionalism,” notwithstanding how extraordinary their credentials may be, so that unless an appellate nominee could persuade the Ranking Member that the person is “committed to the Constitution as originally understood,” he thought that the individual should not be confirmed.<sup>48</sup> Grassley correspondingly asserted that Judge Jackson would not state expressly whether the nominee subscribed to the notion of a “living Constitution,” even though she had explicitly rejected this idea in her prior district level confirmation process,<sup>49</sup> while Chair Durbin rejected the concept as an unacceptable “litmus test.”<sup>50</sup> The Ranking Member concomitantly articulated rather significant concerns regarding how committed nominee Jackson-Akiwumi was to following precedents respecting the Second Amendment of the Supreme Court and of the Seventh Circuit, the nominee’s present views related to *Roe v. Wade*, and other specific features of her tenure in the Federal Public Defender’s Office, even though Jackson-Akiwumi repeatedly attempted to distinctly reassure senators that the nominee would clearly honor every pertinent judicial precedent.<sup>51</sup>

Once the panel ventilated relevant questions, the committee members dutifully voted on the two appellate court and three district court nominees. Because Jackson-Akiwumi was an extremely qualified, moderate nominee, who cogently answered manifold challenging oral and written queries during and following the hearing, the nominee had earned a positive ballot. Nevertheless, only a single GOP politician—116th Senate Judiciary Committee Chair Lindsey Graham (R-SC)—voted for her in the May 20 session.<sup>52</sup> Therefore, Chair Durbin immediately marshaled the name of Jackson-Akiwumi together with the nominations of

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47. S. Judiciary Comm., *Exec. Business Mtg.*, May 13, 2021. I depend substantially in this sentence and in most of this paragraph’s remainder on *id.*, May 20, 2021 (hereinafter “*May 20 Mtg.*”); see Rule 1, *supra* note 46. The Democratic minority panel members routinely held over judicial nominees during the Trump Administration just as the Republican minority panel members had routinely held over judicial nominees in the Obama Administration.

48. *May 20 Mtg.*, *supra* note 47; Carl Hulse, *Senate Panel Advances First Biden Judicial Picks*, N.Y. TIMES, May 21, 2021, at A19.

49. *May 20 Mtg.*, *supra* note 47; Responses of Ketanji Brown Jackson Nominee to Be United States District Judge for the District of Columbia District to the Written Questions of Senator Tom Coburn, M.D., Dec. 12, 2012.

50. S. Judiciary Comm., *Hearing on Nominees*, June 9, 2021; *id.*, *Exec. Business Mtg.*, June 10, 2021. Grassley expressly replied that “any originalist would admit that you take into consideration all of the constitutional amendments.” *Hearing, supra*. See generally Madison Alder, *Durbin Pushes Back on Originalism As Test for Judges*, BLOOMBERG LAW (June 6, 2021), <https://news.bloomberglaw.com/us-law-week/durbin-pushes-back-on-originalism-as-gop-test-for-judicial-picks> [<https://perma.cc/QK7H-ZCFK>].

51. See Hulse, *supra* note 48; Andrew Kragie, *Senators Advance Judge Jackson, 4 More Biden Judicial Picks*, LAW360 (May 20, 2021), <https://www.law360.com/pulse/articles/1386324/sens-advance-judge-jackson-4-more-biden-judicial-picks> [<https://perma.cc/6QY5-DLFN>]; see also *Hearing, supra* note 15.

52. *May 20 Mtg.*, *supra* note 47; Hulse, *supra* note 48; see Glenn Thrush, Jo Becker, & Danny Hakim, *Tap Dancing with Trump. Lindsey Graham’s Quest for Relevance*, N.Y. TIMES, Aug. 15, 2021, at A1 (recounting

the remaining four nominees whom the committee reported to the chamber floor.<sup>53</sup>

After duly receiving Jackson-Akiwumi's name and the nominations of the other four individuals proffered, Senator Chuck Schumer (D-NY), the Majority Leader, essentially needed to rapidly arrange confirmation debates and ballots. Because certain members of the Republican minority party directly rejected unanimous consent to vote expeditiously regarding Jackson-Akiwumi and respecting each of the remaining nominees, the Democratic majority party decided to swiftly pursue cloture, which is a mechanism that basically terminates all debate.<sup>54</sup> The entire Senate should have willingly required cloture, because the five nominees are dynamic, consensus aspirants, who certainly merited prompt confirmation ballots.

During the June 23 cloture debate related to Jackson-Akiwumi, Chair Durbin characterized her as a "really highly qualified nominee [,because] with her qualifications, temperament, and range of experience, she is outstanding."<sup>55</sup> Durbin recounted the outstanding undergraduate and law school education that Jackson-Akiwumi secured when attending exceptional universities, her clerkships for a pair of highly respected federal court jurists, and the nominee's "10 years as a Federal public defender [counseling] hundreds of indigent clients at every stage of the legal process," while the Chair remarked that Jackson-Akiwumi's "perspective on the criminal justice system will be a real asset in the Seventh Circuit."<sup>56</sup> The nominee earned a 53-47 cloture vote during the same day.<sup>57</sup> Because the chamber rules specifically accord the minority party thirty hours of post-cloture debate regarding appellate court nominees, this debate proceeded during June 23 and continued through the following day.<sup>58</sup>

Majority Leader Schumer proudly opened the June 24 chamber session by announcing that the Senate would "confirm yet another one of President Biden's highly qualified nominees to the Federal Bench: Candace Jackson-Akiwumi [,who] left a career at a big law firm to work for 10 years as a Federal defender in Illinois [where] she was a voice in the courtroom for Americans who often

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Senator Graham's interactions with former President Trump and changes that Graham implemented subsequently, including the legislator's extension of overtures to President Biden, such as not opposing Biden federal judicial nominees, which Graham has undertaken throughout the Biden Administration). Senators Graham and Cornyn did cast votes for Judge Jackson in committee. *See May 20 Mtg., supra*.

No Republican committee member voted in favor of Biden executive branch nominees Xavier Becerra, to serve as the Department of Health and Human Services Secretary, or Vanita Gupta, to serve as the Department of Justice Associate Attorney General for the Civil Rights Division, even though the upper-echelon executive branch officials, unlike Article III judges, do not enjoy life tenure. S. Finance Comm., *Exec. Business Mtg.*, Mar. 3, 2021; S. Judiciary Comm., *Exec. Business Mtg.*, Mar. 25, 2021.

53. S. EXEC. CALENDAR, May 24, 2021. The Republican Committee members expressed considerably stronger support when approving the district court nominees. Neals earned a 15-6 ballot, Quraishi enjoyed a 19-3 vote, and Rodriguez earned a 17-5 ballot. *See May 20 Mtg., supra* note 47.

54. S. RULE XXII (2021).

55. 167 CONG. REC. S4,710 (daily ed. June 23, 2021).

56. *Id.*

57. *Id.* at S4,723.

58. *See Tobias, supra* note 5, at 216-17; *see also* S. EXEC. CALENDAR, *supra* note 53.

had no one else to speak for them.”<sup>59</sup> Schumer proclaimed that “after the confirmation of Ms. Jackson-Akiwumi, the Senate will have confirmed more district and circuit court judges in the first year of a Presidency in over 50 years [,so] we are making good, good progress, and we have done it with judges who break the Federal mold— Federal defenders, civil rights lawyers, voting rights lawyers, the first Native American judge, the first Muslim American judge, [all of whom] are individuals of impeccable character and impressive credentials.”<sup>60</sup> The Senate expeditiously concluded the floor debate and confirmed Jackson-Akiwumi on a 53–40 ballot later that day.<sup>61</sup>

Judge Jackson-Akiwumi’s strong confirmation vote means that she will realize a number of milestones. The nominee has become “only the second Black woman ever” to serve on the Chicago-headquartered tribunal and the lone individual of color presently serving as this court’s member, while the jurist is merely the third appellate court member nationwide who has actively devoted a majority of her professional career to representing defendants accused with engaging in federal criminal activity.<sup>62</sup>

The confirmation of President Biden’s initial five judicial nominees, and especially Circuit Judges Jackson-Akiwumi and Ketanji Brown Jackson, demonstrates that the chief executive has been carefully implementing the solemn pledge that his administration would comprehensively restore diversity vis-à-vis ethnicity, gender, ideology, and experience to every level of the federal courts,

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59. 167 CONG. REC. S4,735 (daily ed. July 24, 2021); Lynn Sweet, *Senate Confirms Jackson-Akiwumi for 7th Circuit Court of Appeals: Only Black Judge on Chicago Panel*, CHI. SUN-TIMES (June 24, 2021), <https://chicago.suntimes.com/columnists/2021/6/24/22549625/senate-confirms-jackson-akiwumi-7th-circuit-court-of-appeals-only-black-judge-on-chicago-panel> [<https://perma.cc/63VC-SEHK>].

60. 167 CONG. REC. S4,735–36. The Majority Leader elaborated: “The Democratic Senate is restoring balance to the judiciary with highly qualified, mainstream jurists who reflect the diversity of this country, and we are going to keep at it when we come back in July and beyond.” *Id.* President Biden confirmed Lydia Griggsby, a well-qualified, mainstream Native American jurist, to the District of Maryland, while the White House has nominated Lauren King, another highly experienced, moderate Native American, to the Western District of Washington, and the Senate will probably confirm her during the Autumn after the chamber returns from the August Recess. 167 CONG. REC. S4,573 (daily ed. June 16, 2021) (confirming Griggsby); Third Slate, *supra* note 14 (nominating King); S. Judiciary Comm., *Exec. Business Mtg.*, July 15, 2021 (approving King). Presidents Jimmy Carter, Bill Clinton, Barack Obama, and Donald Trump each confirmed one Native American federal court judge: Frank Howell Seay, Billy Burrage, Diane Humetewa, and Ada Brown. *See American Indian Judges on the Federal Courts*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/judges/search/american-indian> [<https://perma.cc/SH8L-9CB8>] (last visited Aug. 23, 2021).

61. 167 CONG. REC. at S4,748.

62. Jackson-Akiwumi will be one of fewer than ten Black women to serve on the federal appellate court bench. Ann Marimow, *Court Pick Kept Focus on the Climb*, WASH. POST, May 4, 2021, at B1; Sweet, *supra* note 15; Sweet, *supra* note 19; Sweet, *supra* note 59. President Biden has already confirmed four Black women to the appellate courts, because the White House also nominated, and the Senate confirmed, Judge Jackson to the D.C. Circuit, Judge Tiffany Cunningham to the U.S. Court of Appeals for the Federal Circuit and Judge Eunice Lee to the U.S. Court of Appeals for the Second Circuit. CONFIRMATION LISTING (2021), *supra* note 3. *But see supra* notes 15, 34 and accompanying text (Trump could not manage to nominate, much less confirm, one Black individual for a single appellate court vacancy, notwithstanding his administration’s herculean endeavors to rapidly fill fifty-four openings with extremely conservative, young white males and three Supreme Court vacancies with conservative appointees, two of whom are exceptionally conservative, comparatively young white males, throughout the former President’s four years).

but particularly the appellate courts. Biden and the Democratic Senate majority—especially Judiciary Committee members and the rigorous, effective, and fair Chair Durbin—must continue nominating and confirming more prospects who are similar to the individuals already confirmed by deploying procedures, which resemble the salutary practices that President Biden, the Democratic chamber majority, and the Judiciary Committee have been actively employing. Important examples are the ways in which President Biden and the White House Counsel Office have engaged in assiduous consultation of home state legislators, and the Judiciary Committee has undertaken thoroughgoing, incisive, robust, and equitable processing of nominees. These initiatives can reverse or ameliorate the detrimental effects of the systems which Trump and the Republican chamber majority applied when nominating and confirming appeals court jurists, who undercut the abovementioned diversity elements, while the efforts can fill numerous current and future openings with highly qualified, centrist judges who improve diversity in terms of ethnicity, gender, sexual orientation, ideology, and experience.

#### IV. CONCLUSION

Multiple ideas—especially profound regard for Judge Joel Flaum’s innumerable years of distinguished public service, the citizenry’s potent election of Joe Biden to serve as the President who chooses jurists, and longstanding judicial selection requirements, norms, and conventions—demonstrate why former President Donald Trump and the chamber properly refrained from nominating and confirming Judge Flaum’s successor during the minimal time which remained in the waning days of the 116th Congress. President Biden perceptively and swiftly designated Candace Jackson-Akiwumi to replace the venerated jurist with the valuable assistance of Judiciary Committee Chair Durbin, who initially recommended the stellar nominee to the White House and orchestrated her comprehensive, rigorous, and fair Judiciary Committee investigation, confirmation hearing, nominee qualifications discussion, and ballot as well as Jackson-Akiwumi’s chamber floor debate and confirmation. The chamber diligently and robustly conducted the nominee’s Senate examination, spearheaded by the Senate Judiciary Committee, and promptly confirmed her, because she will be an impressive, mainstream judge who contributes plentiful ethnic, gender, ideological, and experiential diversity to the Seventh Circuit.

President Biden and the Democratic Senate majority must keep nominating and confirming additional candidates, who manifest qualifications that seem analogous to those which Candace Jackson-Akiwumi possesses, by invoking salient procedures that efficaciously yielded the initial, and subsequent, cohorts of well-qualified, moderate jurists. If the President and the nascent chamber majority actively continue following the approaches effectuated thus far, the White House and the Democratic senators can simultaneously remedy or temper the deleterious impacts of the selection process which Trump and the Republican chamber majority invoked in confirming judges who undermine federal court diversity parameters, especially on the appellate courts, while Biden and the

chamber Democratic majority could fill numerous vacancies with highly-qualified, mainstream nominees who restore diversity vis-à-vis ethnicity, gender, sexual orientation, ideology, and experience.