

MEMORANDUM

TO: Interested Parties
FROM: Christopher Kang, Demand Justice Chief Counsel
DATE: June 21, 2022
RE: Steps needed to avoid leaving judicial vacancies to the next Congress

The good news on judicial nominations in the Biden era is that Democrats have confirmed more judges so far in his presidency than we have seen under any president since John F. Kennedy. The bad news is, even this historic pace has not been enough to keep up with the rate of judicial retirements, and Democrats are right now set to leave more than 60 vacancies unfilled by the end of this Congress.

Today, there are more than twice as many announced vacancies for lifetime federal judgeships as there were when President Biden took office. In one sense, this is a great problem to have, as it gives Biden the chance to leave an even greater imprint on the federal judiciary for decades to come. But this window of opportunity, if not seized, could also cause pangs of regret for Democrats in the future.

Given the possibility that Republicans could retake the Senate in the midterm elections, Democrats must do everything in their power to fill all 119 announced judicial vacancies before a new Congress is sworn in. When Republicans took control of the Senate in 2015, they blocked all but a few of President Obama's nominees, and there is little doubt they would do the same now.

The right-wing hijacking of the judiciary is already an existential threat to this and any future Democratic administration's ability to make progress on key issues. Leaving existing vacancies vulnerable to a potential blockade by Mitch McConnell would add a bitter postscript to one of the signature achievements of Biden's presidency.

Filling these remaining vacancies will require the White House, Judiciary Committee, and Senate Democrats to build on their historic success and treat judicial nominations with even more urgency. This memo outlines changes needed at various steps of the confirmation process to fill these vacancies.

More nominations

When President Biden took office, there were 53 announced vacancies for lifetime federal judgeships. Today, there are 119. Because of the Supreme Court vacancy, delay from some Senate Democrats in making recommendations for judicial vacancies in their states, and Republican obstruction, there are only pending nominees for 35 of these vacancies.

While Ketanji Brown Jackson's nomination and confirmation to the Supreme Court of course required significant attention from across the administration, the White House now must similarly deploy all necessary resources to significantly increase its lower court nominations.

More than half of the vacancies without nominees – 47 – are in states represented by Democratic senators. While some senators have been diligent about quickly recommending professionally diverse nominees, some have not, and the White House should begin enforcing its own deadlines. In December 2020, then-incoming White House Counsel Dana Remus informed Democratic senators, “Moving forward, we will request that you forward names to us within 45 days of any new vacancy being announced, so that we can expeditiously consider your recommendations.” (emphasis in original!) Unfortunately, many Democrats have been delinquent – even by a matter of months. It is time for Democratic senators to step up and meet the White House’s timeline – and for the White House to bypass senator recommendations in situations when those lawmakers take too long. California alone has 9 district court vacancies without nominees – five of which were announced more than a year ago – which is especially disappointing since both California senators serve on the Judiciary Committee.

The White House also needs to stop allowing itself to be hamstrung by Republican senators. Senate Republicans confirmed 17 Trump judicial nominees over the objections of at least one home-state Senator. So far, Senate Democrats have confirmed zero Biden judges over the objections of a home-state senator. At the circuit-court level, the Biden administration still has five vacancies with Republican home-state senators without a nominee. At the district-court level, there are 40 such vacancies and only two nominees – and Senate Democrats are forcing the White House to pick a new nominee for one of them because Senator Ron Johnson pulled his support for President Biden’s pick – *after recommending him* to the White House in the first place. If Republicans are not going to work in good faith, it is time for the White House to nominate more judges in states with Republican senators and challenge the Senate to confirm them.

More hearings

As President Biden increases the pace of his nominations, the Senate Judiciary Committee must increase the pace at which it processes nominees, so that all of those nominees can be confirmed.

Under the usual approach, the Committee holds one nomination hearing every two weeks the Senate is in session. With the currently planned Senate schedule, this means there will be only 7 more nominations hearings this year with enough time for Committee votes before Congress adjourns. That would allow the committee to process nominees for fewer than half of the 119 announced vacancies. That is not an acceptable outcome.

The need to increase the number of hearings is especially acute because Senate Democrats lost pace during consideration of Ketanji Brown Jackson’s Supreme Court nomination. In the four months after Justice Breyer announced his retirement, Chairman Durbin held 6 nomination hearings for 25 lifetime judicial nominees. That’s six fewer judicial nominees than Republicans processed during the same timeframe after Justice Kennedy’s retirement – despite the fact that the Committee held additional hearings for Kavanaugh’s confirmation.

Senate Democrats could add more hearings by taking a page from Republicans and canceling recess or even scheduling hearings while the Senate is in recess. In 2018, Republicans convened the Senate in August, canceling part of the typical recess, and held a hearing for six judicial nominees. That October, Republicans even held two hearings when the Senate was in recess. In contrast, right now Senate Democrats have scheduled an unusually long two-week recess for the Fourth of July; if their July work period were five weeks instead of four, they could add another hearing even under the usual schedule.

As necessary, Democrats should also follow the Republican precedent of holding hearings in consecutive weeks. In October 2018, Republicans held three hearings in three consecutive weeks for 16 judicial nominees. Democrats should stop playing by a different set of rules when they are in power and embrace this approach.

More nominees at each hearing

It will not be enough for Democrats to add a few extra hearings to schedule; they also must increase the number of nominations considered at each hearing.

When Republicans are in power, they bend the rules on how many nominees can be processed at a single hearing so they can confirm more judges. During the Obama administration, Republicans insisted on the Committee considering only a single circuit court nominee and no more than five total nominees at each hearing. In the entire Obama presidency, the Judiciary Committee only held three hearings with two circuit court nominees and only seven hearings with more than five nominees. During the Trump administration, Republicans shattered both of these norms to move Trump nominations through more quickly. In four years, they held 13 hearings with two circuit court nominees and 11 hearings with six or more nominees.

While Chairman Durbin has thankfully not gone back to the prior limits of the Obama administration, instead following the same precedents set by Republicans during Trump, it is not enough to allow Republicans to constantly change the rules to their benefit, while Democrats simply adhere to those new norms. If Republicans could add nominees to the typical hearing slate, Democrats can too – and they must, to address the backlog of judicial vacancies. Chairman Durbin has already moved in this direction by holding a hearing just last week for seven nominees, and he should continue to hold hearings with seven nominees until all Biden judicial nominations are considered.

More floor time

Assuming Democrats can begin processing more nominees more quickly out of the Judiciary Committee, they must continue to prioritize those nominees on the Senate floor, to ensure all of them get confirmed.

Obstructionist Republicans are availing themselves of every procedural obstacle, and even just the 21 judicial nominees who have already had Committee votes could take up to 47 roll call votes and 288 hours of floor time to be confirmed.

Senate Democrats must ensure that every judicial nominee is confirmed, and that should include seeking to ensure that the Executive Calendar is cleared and every judicial nominee who has had a Committee vote before the August recess is confirmed before the Senate takes its planned four-week recess.

This fall, Senate Democrats also must be prepared to stay in Washington through weekends and work through scheduled recesses if necessary to prioritize judicial confirmations. From Labor Day to Target Adjournment, the Senate is currently only scheduled to be in session for 43 days (assuming the business as usual schedule where they are not in session or voting on Fridays or during the weekends).

The cost of inaction

History makes clear what awaits President Biden's judicial nominees if Republicans retake control of the Senate. In 2015-16, when Senate Republicans controlled the Senate at the end of the Obama administration, they confirmed only 22 lifetime federal judges – the [fewest since President Truman in 1952](#). In fact, they confirmed only two circuit court judges – the fewest since the 1800s. As Judiciary Committee member Sen. Sheldon Whitehouse has said, filling all vacancies is a “prudent goal” because “The prospect that we won’t always have a Democratic president and a Democratic majority in the Senate should motivate us to move with real dispatch this time.”

Failing to fill these vacancies under a Democratic Senate may also tarnish President Biden's remarkable legacy of increasing professional and descriptive diversity on the federal bench. While President Biden's nominees have shattered records for their racial, gender, and professional diversity, there is little doubt that the small number of judges he would be able to confirm under a Republican Senate would be dramatically less diverse on all accounts.

Finally, even if Democrats do retain control of the Senate, having confirmed as many Biden nominees as possible will still be a huge advantage. While there are currently a significant number of vacancies, there are also many Democratic-appointed judges who are eligible but have not yet taken senior status. Filling all the existing vacancies is the best way to encourage as many of those judges as possible that their vacancies will be filled and justice will not be delayed. This would even further maximize the historic Biden legacy on judges.