

# THE WALL STREET JOURNAL.

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U.S.

## Biden Has First Shot at Judicial Vacancies

Judges have retired or taken senior status, opening the way for the president to put his stamp on the judiciary



Mr. Biden is preparing to unveil his first slate of judicial nominations. There are at least 68 judicial vacancies on the federal district and circuit courts.

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By [Laura Kusisto](#) and [Ken Thomas](#)

March 29, 2021 6:00 am ET

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President Biden has the first chance to put his stamp on the federal judiciary as dozens of federal judges have stepped down from active duty in recent months.

There are at least 68 judicial vacancies on the federal district and circuit courts, and Mr. Biden's first slate of judicial nominations is expected to come as early as this week. That is fewer than the 116 that President [Donald Trump](#) had in his first months in office in 2017, and relatively few are at the appellate level, but it gives Mr. Biden [an opening to begin offsetting his predecessor's judicial legacy](#).

Mr. Biden's options have been bolstered by about 18 judges—10 appointed by Democrats, eight by Republicans—who have cleared the way for Mr. Biden to appoint a successor by taking senior status since he was sworn in as president on Jan. 20. That compares with 10 during the first two months of President Trump's term. Senior judges have a lighter workload and fewer responsibilities.

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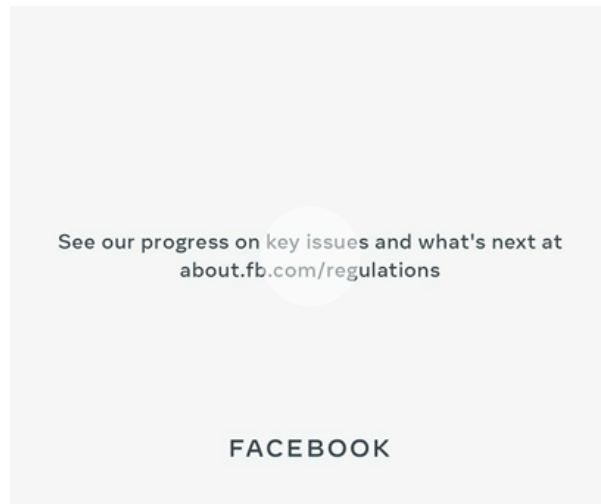
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*Will President Biden be able to match the impact President Trump made at the judiciary level? Why or why not? Join the conversation below.*

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“We have seen a lot of swiftness on the part of federal judges that were clearly waiting out Trump to take senior status or retire,” said Brian Fallon, executive director of Demand Justice, a nonprofit pushing for more liberal judges. Mr. Biden, he said, “has an immediate opportunity right off the bat to make dozens of appointments in the first year.”

Nonetheless, Mr. Biden inherits a much smaller opportunity to tip the ideological balance of the federal judiciary than Mr. Trump, who placed 54 appeals-court judges in his four years, [flipping the overall makeup](#) of the circuit courts to majority Republican-appointed. In all, 54% of full-time judges on those courts [were Republican-appointed when Mr. Trump left office](#), up from 40% at the beginning of his term.



“He’s not going to accomplish as much as President Trump did and everybody understands that,” said William & Mary law professor Neal Devins.

Mr. Biden currently has just seven vacancies on the federal circuit courts, the appellate judges whose power is only surpassed by the Supreme Court. Mr. Biden inherits the smallest number of circuit-court openings since the early months of Ronald Reagan’s presidency in 1981, according to an analysis by Russell Wheeler, a visiting fellow at the Brookings Institution. Mr. Trump had nearly three times as many vacancies at the same point in his presidency, in part because former President Barack Obama had trouble convincing the Republican-controlled Senate to fill his open positions.





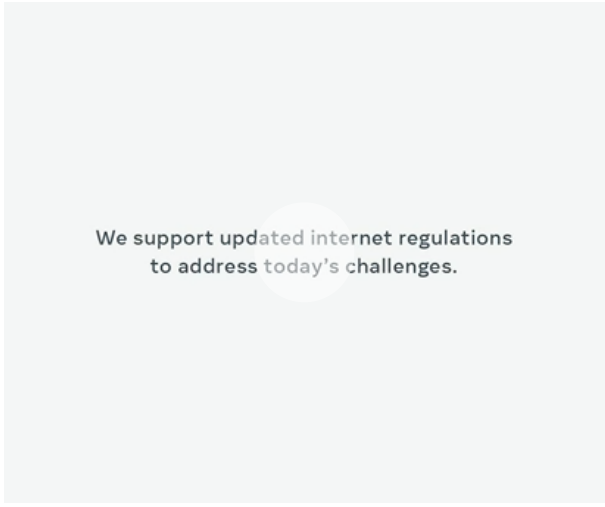
Judge Ketanji Brown Jackson is a leading contender for the nomination to replace Merrick Garland on Washington's appeals court.

PHOTO: ASSOCIATED PRESS

Judge Ketanji Brown Jackson, of Washington, D.C.'s U.S. District Court, is considered a leading contender for the nomination to replace Merrick Garland on Washington's appeals court, after he stepped down to become attorney general, according to people familiar with the process.

Democrats have a larger opportunity on the lower-level district courts, where there are 61 slots to fill, compared with 97 at the same point in Mr. Trump's presidency, according to Mr. Wheeler's analysis.

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The Biden administration benefits more if judges take senior status rather than retire because judges continue to hear cases. More than 60 judges in December were eligible for senior status based on their age and years of service, creating a significant potential opportunity for Mr. Biden, said Marin K. Levy, a professor at Duke Law School.

Though judicial picks are important to both parties' bases, judges don't always rule in favor of the president who chose them. In Mr. Trump's case, several of his appointed judges ruled against his lawsuits challenging the 2020 election results. President Bill Clinton appointed Supreme Court

Justices Ruth Bader Ginsburg and Stephen Breyer, who ruled against him in a unanimous court decision in 1997 that allowed Paula Jones’s sexual-harassment lawsuit to proceed.

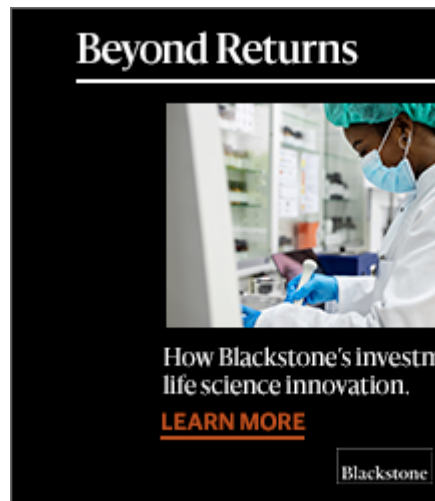
Mr. Biden will need to keep the Democratic caucus unified to fill the vacancies, with his party holding a narrow 50-seat Senate majority with Vice President [Kamala Harris](#) serving as a tiebreaking vote.

## **‘I don’t think that Biden is going to be motivated by a desire to avoid confirmation battles.’**

— William & Mary law professor Neal Devins

Legal and political observers don’t expect Mr. Biden to limit his picks to moderate nominees, even with a closely divided Senate. They say Democrats appear eager to take a more aggressive approach after watching Mr. Trump’s success confirming younger, more ideological nominees.

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“I don’t think that Biden is going to be motivated by a desire to avoid confirmation battles,” Mr. Devins said. “The stakes are too high.”

Mr. Biden, a former chairman of the Senate Judiciary Committee, brings an extensive background on judicial nominations. His chief of staff, Ron Klain, was chief counsel to the Judiciary Committee when Mr. Biden was

chairman and later oversaw judicial nominations for President Bill Clinton as an associate White House counsel.

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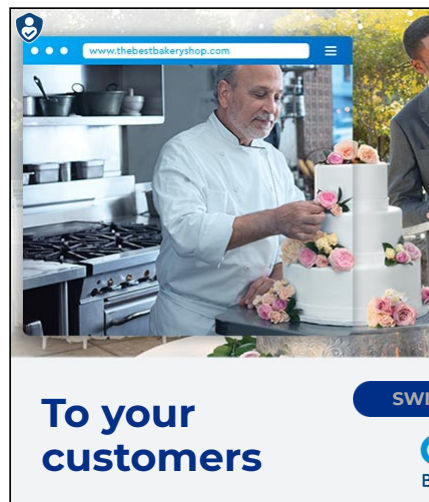
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Mr. Biden's administration has signaled it will try to create more diversity in the professional background of judges, considering public defenders and civil-rights attorneys. Left-leaning groups have complained that the Obama administration appointed too many prosecutors and corporate lawyers to smooth their path to confirmation in a Republican-controlled Senate.

Carrie Campbell Severino, president of the right-leaning Judicial Crisis Network, said her group plans to oppose judicial nominees it views as too ideological, although she acknowledged that as long as Democrats control the Senate it is unlikely senators will oppose their own party's nominee.

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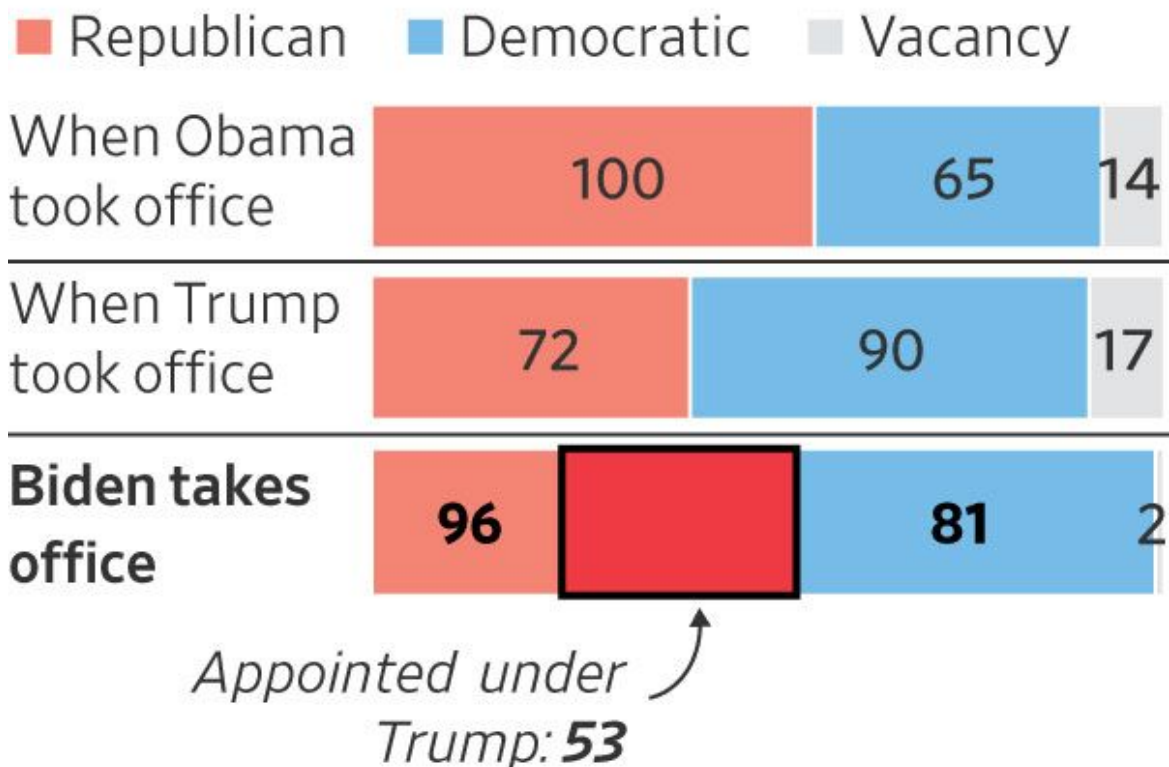
“We need to make sure that this administration is being held accountable for the types of extremist judges that they’re putting on the bench,” she said.

The left-leaning American Constitution Society is attempting to emulate the [success of the right-leaning Federalist Society](#), the conservative legal network that influenced Mr. Trump’s choices for the courts. The American Constitution Society has recommended about 400 federal judicial candidates for Mr. Biden—the first time the organization has taken on such a role.

“There has never been a systematic approach on the progressive side to identifying the kind of diverse candidates that this administration wants to appoint,” said Russ Feingold, president of the American Constitution Society and a former Democratic U.S. senator from Wisconsin.

## Trump’s Imprint on U.S. Appeals Courts

### Circuit court judges by party of appointing president



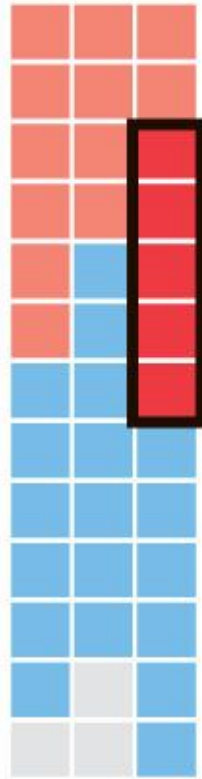
*By circuit*

**1st Circuit**

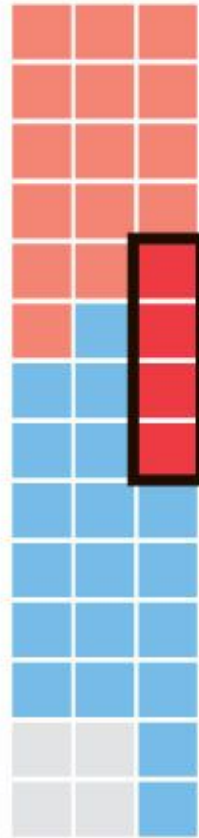


↑ Obama takes office  
↑ Trump takes office  
↑ Biden takes office

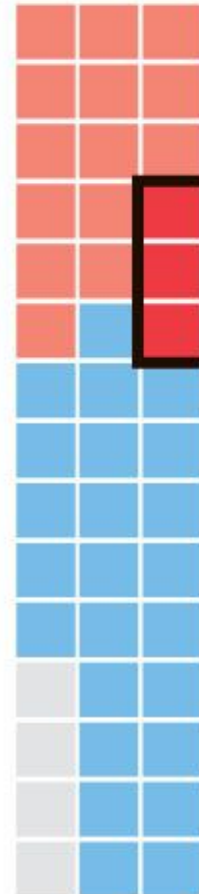
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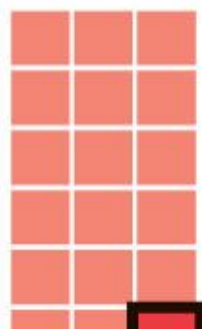
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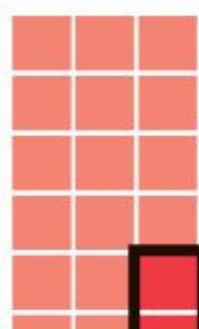
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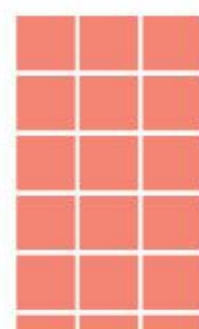
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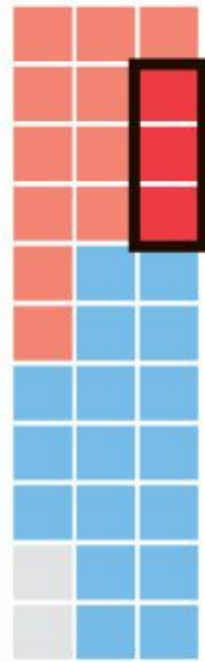
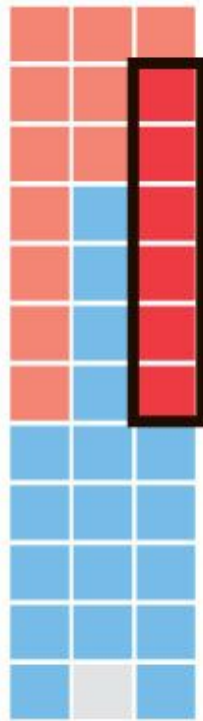
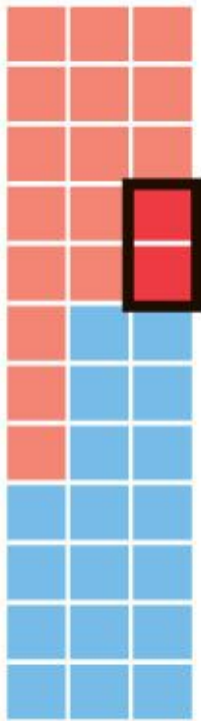
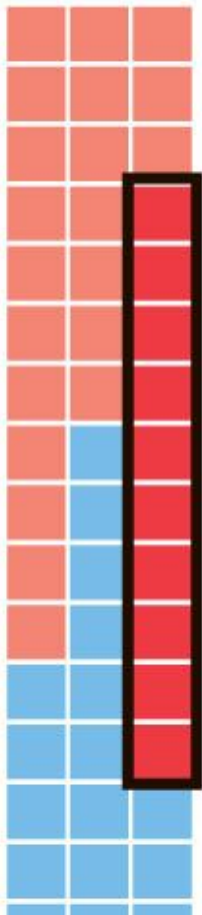
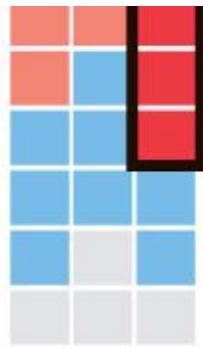
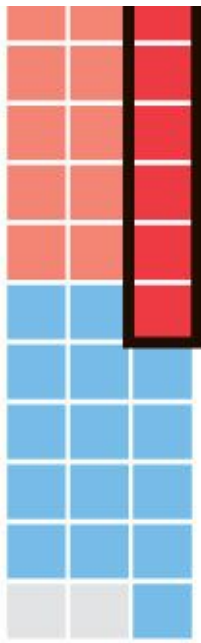
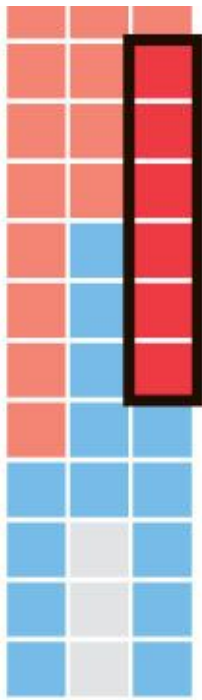
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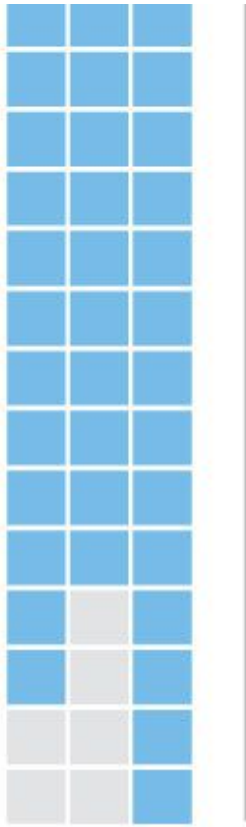


**8th**









Note: Federal circuit not shown

Sources: Federal Judicial Center; U.S. courts

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