Pushing Forward, Pulled Back?:

President Biden, the Federal Judiciary, and the Administrative State

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Abstract

Gaining influence and control over the administrative state is a key component to the success of a president's policy agenda. This includes the placement of appointments in areas of policy priority, structural reorganizations, and centralization of administrative rule making activity. However, the posture of the federal judiciary is also essential to the longevity of a president's administrative goals. Specifically, legal challenges to administrative policy can buttress, modify, or even halt administrative action developed by or supported by the president. The president's ability to shape the federal judiciary can ensure the placement of judges sympathetic to the president's ambitions. Conversely, judges opposed to a specific president's policy agenda, or the exertion of administrative power generally, can significantly curtail a president's administrative goals. This article discusses the Biden Administration's interaction with the federal judiciary along two components: 1) Biden's impact on shaping the "personnel" of the federal judiciary and 2) challenges faced by the Biden Administration's agenda before the U.S. Supreme Court. Whereas Biden's impact on lower federal courts will likely influence the composition of the judiciary for decades to come, I also explain how the U.S. Supreme Court's decisions in administrative law during the Biden Presidency work to concordantly shape judicial, executive, and litigant behavior in a manner contrary to Biden Administration preferences.

Key Words: Judiciary, Executive Branch, Presidential Power

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INTRODUCTION

In response to the U.S. Supreme Court's 6-3 ruling in *Corner Post, Inc. v. Board of The Federal Reserve System* (2024)[2], which expanded the length of time for litigants to challenge agency action, Justice Ketanji Brown Jackson dissented and exclaimed:

> The Court's baseless conclusion means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face. Allowing every new commercial entity to bring fresh facial challenges to long-existing regulations is profoundly destabilization for both Government and business. It also allows well-heeled litigants to game the system by creating new entities or finding new plaintiffs whenever they blow past the statutory deadline.[3]

Jackson's sharp dissent in *Corner Post*, *Inc*., just one of a string of Supreme Court decisions seemingly constraining administrative power during the Biden Administration, represents a tale of contrast. Justice Jackson's presence on the Supreme Court reflects a promise fulfilled from the Biden Administration to appoint the first African-American woman Supreme Court justice (Jackson 2022, Johnson 2021). However, substantively, Jackson found herself in the dissent of a number of salient Supreme Court decisions that overturned agency action, and Biden-specific administrative policy.

Gaining influence and control over the administrative state is a key component to the success of a president's policy agenda. This includes the placement of appointments in areas of policy importance and priority, structural reorganizations, and centralization of administrative rule making activity (Lewis and Richardson 2021, Moe 2012, Resh 2015). However, the tenor of the federal judiciary is also essential to the survival and longevity of a president's administrative goals. The president's ability to shape the federal judiciary can ensure the placement of judge's sympathetic and supportive of the president's agenda (Hollis-Brusky and Parry 2021). Conversely,

[2] 144 S. Ct. 2440 (2024)
[3] *Corner Post, Inc v. Board of The Federal Reserve System,* at 2 (Jackson, J., dissenting)

the presence of judges opposed to specific administrative policies or the exertion of administrative power broadly, can significantly curtail a president's administrative policy.

This article discusses the Biden Administration's engagement with the federal judiciary along two components. Part 1 discusses Biden's impact on the federal judiciary, particularly lower federal courts. Benefiting from a razor-thin majority in the Senate, Biden worked closely with Senate Democrats to move swiftly with judicial appointments by targeting "friendly" judicial seats to avoid Republican opposition. The Biden Administration also pursued a strategy of prioritizing racial and gender diversity in their judicial nominees, significantly reshaping the demographics of the federal judicial hierarchy.

However, despite the success in shaping the personnel of the federal judiciary, Part 2 provides an overview of Supreme Court litigation involving federal administrative agencies, with a discussion of the challenges faced by the Biden Administration. Wielding the power of the administrative state was key component of the Biden policy agenda in areas such as student loan debt, environmental policy, and public health (SoRelle and Laws 2024, Johnson, Hickey, and Small 2024). I explain how the U.S. Supreme Court's decisions in administrative law during the Biden Administration concordantly shape judicial, executive, and litigant behavior. Specifically, the use of the Major Questions Doctrine, reversal of *Chevron* precedent, and the ruling in *Corner Post, Inc*., work to constrain lower federal court behavior and executive behavior, while expanding litigant access in a way that can aid the Supreme Court in monitoring ineffective compliance from executive and judicial actors.

"PUSHING FORWARD": RESHAPING THE FEDERAL JUDICIARY

A president's imprint on the federal judiciary is potentially one of the most enduring aspects of her legacy. Whereas executive orders can be retracted by subsequent presidents (Thrower 2017a), or a president's legislative priorities curtailed by future congressional delegations, judicial appointees have the capacity to shape the direction of federal law decades after the end of a presidential term. Recognizing this, then-Senator Majority Leader Mitch McConnell (R-KY) referred to President Trump's judicial appointments as the "most long-lasting accomplishment of the current administration" (Sherman, Freking, and Daly 2020). The lifetime tenure of judgeships makes them high-value seats for a given selectorate (Binder and Maltzman 2009, Helmke and Staton 2011). President Biden has been able to confirm nominees at a record pace, increase the diversity of the federal bench, and "flip" multiple judicial circuits from Republican to Democratic-judge appointee majorities. However, the Biden Administration and Senate Democrats still had to navigate a highly polarized Senate environment.

Conflict and Polarization

Congressional polarization has exacerbated the conflict over federal judicial nominees (Bartels 2015, Neal and Baum 2017). Increasing ideological disagreement between the president and Senate not only increases confirmation times but also increases the likelihood that a nomination fails (Primo, Binder, and Maltzman 2008, Binder and Maltzman 2002). The conflict over judicial nominations reached a crescendo during the Obama Administration. Democratic leaders accused the minority Republican Party in the Senate of record levels of obstructions in the Senate. Cloture motions do not necessarily perfectly correspond to filibuster attempts[4]; however,

[4] For example, not all filibusters result in cloture motions. U.S. Library of Congress, Congressional Research Service, *Cloture Attempts on Nominations: Data and Historical Developments Through November 20, 2013, by* Richard S. Beth, Michael Greene, and Elizabeth Rybicki RL32878 (2018). https://crsreports.congress.gov/product/pdf/RL/RL32878#:~:text=From%201949%20through%20November%2020,these%20114%20nominations%20were%20confirmed.

cloture motions can be used in attempt to end nomination filibusters. In the 112th Congress (2011-2012), 26 cloture motions were introduced on judicial nominations, the highest number during any single Congress.[5] Faced with this gridlock, on November 21, 2023 Senate Majority Leader Harry Reid (D-NV) decided to go "nuclear" and through a parliamentary procedure adjustment, effectively removed the ability for senators to filibuster judicial nominees (Boyd, Lynch, and Madonna 2015). Whereas previously a president required 60 votes for a successful cloture motion to end a filibuster of a judicial nominee, post-nuclear option, lower federal court judges could be confirmed with a bare majority (Boyd, Lynch, and Madonna 2015). In 2017, Senate Majority Leader McConnell would later take this one step further and remove the ability to filibuster Supreme Court nominees (Davis 2017).

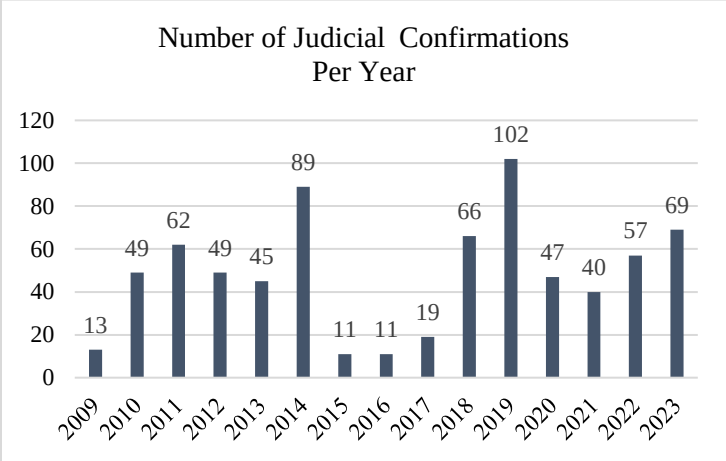
Judicial Appointments in a Post-Nuclear Landscape

The reduced ability for an out-party senator, or an oppositional in-party senator (Steigerwalt 2010), to obstruct the forward movement of a nomination, can aid in the speed and overall number of confirmations when the president's party has majority control of the Senate. Post-nuclear option, the number and pace of President Obama's nominees increased noticeably. However, with the loss of the Senate majority in 2014, as seen in Table 1, President Obama only confirmed 22 judicial nominees during his last two years in office, bringing Obama's judicial confirmation total across two terms to 329 Article III judges confirmed.[6] President Trump was able to confirm the second highest number of federal judicial confirmations in a single term with 234 Article III confirmations.[7] As of July 31, 2024, President Biden has confirmed 205 Article III judges, thanks in part to the Democratic Party maintaining their slim Senate majority during the

[5] Ibid, at 9.
[6] Statistics refer to confirmation meaning that an individual judge could count more than once towards the confirmation total if they were appointed to multiple federal judicial position during a single presidential term.
[7] "Biographical Directory of Article III Judges, 1789-present." Federal Judicial Center. https://www.fjc.gov/history/judges.

2022 midterm elections.[8] Biden's confirmation total includes 1 Supreme Court Justice, 43 Court of Appeals Judges, 159 District Judges, and 2 judges for the Court of International Trade.

Table 1. Judicial Confirmations Per Year (2009-2023)[9],[10]



Biden, who once served as Chairman of the Senate Judiciary Committee was initially able to move swiftly during his first months in office. During his first six-months[11], Biden had 30 judges nominated, and 8 judges confirmed. Comparatively, President Obama[12] nominated 10 judges with 0 confirmed during his first 6 months, and President Trump nominated 27 judges with 4 confirmed, including Supreme Court Justice Neil Gorsuch. Table 2 includes a measure of confirmation efficiency. Specifically, it counts the total number of judicial confirmations as a percentage of the total number of nominations made during a presidential term. Importantly, a president may have to nominate a judge multiple times prior to a successful confirmation, therefore an individual judge

[8] Ibid
[9] Ibid
[10] Judge Marvin Quattlebaum, Jr. was confirmed twice in 2018 (District Court for South Carolina in March 2018 and subsequently to the Fourth Circuit in August 2018).
[11] January 20, 2021-July 20, 2021. Six-month nomination figures compiled from Federal Judicial Statistics on successful ("Biographical Directory of Article III Judges") and unsuccessful nominations. "Unsuccessful Nominations and Recess Appointments." Federal Judicial Center. https://www.fjc.gov/history/judges/unsuccessful-nominations-and-recess-appointments .
[12] Justice Sotomayor was President Obama's first confirmed federal judge on August 8, 2009.

may be counted more than once in the "total nominations figure."[13] For example, President Obama's 173 Article III judicial confirmations during his first term represented 64 percent of the judicial nominations submitted to the Senate. For his second term, 55 percent of his nominations submitted to the Senate resulted in judicial confirmations, noticeable decrease. Excluding 2024[14], 66 percent of Biden's nominations submitted to Congress have resulted in judicial confirmations.

Table 2. Nomination "Efficiency"

	Total Nominations	Unsuccessful Nominations	Confirmed Nominations	Percentage
Obama Term 1	269	96	173	64%
Obama Term 2	282	126	156	55%
Trump	385	151	234	61%
Biden (2021-2023)	251	89	166	66%

Biden's Judicial Landscape

Upon taking office in January 2021, Biden faced a Senate with a 50-50 split, with Vice President Kamala Harris serving as the tie-breaking vote. Interestingly, President Biden also "inherited" far fewer judicial vacancies as compared to President Trump.[15] As shown in Table 3, President Trump entered office with over 100 inherited judicial vacancies. The significantly reduced rate of confirmations for Obama during his last two years referenced earlier is a likely

[13] For example, Louis B. Butler, Jr. was nominated four times during President Obama's first term. His nomination never received a Senate vote. "Unsuccessful Nominations and Recess Appointments." Federal Judicial Center. https://www.fjc.gov/history/judges/unsuccessful-nominations-and-recess-appointments. Nominations that expire at the end of a congressional session without a Senate confirmation vote are returned to the president. Withdrawn nominations are also considered unsuccessful nominations.

[14] 2024 corresponds to the second session of the 118th Congress.

[15] Although a judge taking senior status can give the president the opportunity for an additional appointment, the timing in which a judge senior status can affect whether there is sufficient time a nominated judge to successfully traverse the confirmation process. The time-period from nomination to confirmation can range from weeks to months, with nominations not completing the confirmation process expiring at the end of a congressional session. During the first year of Biden's term, the minimum time length for the process from nomination to confirmation was 50 days for district court nominees and 56 days for circuit court nominees. U.S. Library of Congress, Congressional Research Service, U.S. Circuit and District Court Nominees Confirmed During the First Year of the Biden Presidency: Overview and Analysis, by Barry McMillion R47025 (2022).

contributor to this figure. These inherited vacancies provided Trump with a clear advantage in terms of his ability to shape the judicial landscape.

However, additional vacancies throughout a president's term can emerge as judges take senior status, a partial-retirement where judges work a reduced caseload, allowing the president to fill the now "vacant" seat. Between January 2021 and July 2024, 158 Article III[16] district and circuit judges assumed senior status (Table 4) opening the judicial landscape for Biden.

[16] "Biographical Directory of Article III Judges, 1789-present." Federal Judicial Center. https://www.fjc.gov/history/judges.

Table 3. Inherited Vacancies: 2009-2021[17]

	Obama (2009)	Obama (2013)	Trump (2017)	Biden (2021)
U.S. Court of Appeals Vacancies	13	16	17	2
U.S District Courts Vacancies	40	59	86	43
U.S. Court of International Trade Vacancies	0	2	2	1
Total	53	77	105	46

Table 4. Vacancies During Presidential Term: Senior Status and Elevations[18]

	Obama Term 1	Obama Term 2	Trump	Biden (through July 2024)
Senior Status				
U.S. Court of Appeals Senior Status	26	22	29	34
U.S. District Court Senior Status	125	129	106	123
U.S. Court of International Trade Senior Status	1	4	2	1
Senior Status Total	152	155	137	158
Judicial Elevations				
U.S. Supreme Court Elevations	1	0	3	1
U.S. Court of Appeals Elevations	14	5	10	13
Elevations Total	15	5	13	14

Presidents can also "create" vacancies through the nomination and promotion of a lower court judge to a higher court, which provides a "2 for 1" confirmation opportunity. For example, in 2021, President Biden nominated then-D.C. District Judge Ketanji Brown Jackson to serve on the D.C. Court of Appeals. The elevation of Jackson allowed President Biden to fill Jackson's former district seat with Judge Florence Pan, making Pan the first Asian-American woman to serve on a D.C. federal court (Andrade-Rhoades 2021). President Biden's nomination of Ketanji Brown

[17] "Archives of Judicial Vacancies." United States Courts. Judges & Judgeships. https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies.
[18] "Biographical Directory of Article III Judges, 1789-present." Federal Judicial Center. https://www.fjc.gov/history/judges.

Jackson to fill Justice Stephen Breyer's Supreme Court seat in 2022 allowed him to subsequently nominate D.C. District Judge Pan to fill Jackson's former D.C. Appeals seat. Between January 2021 and July 2024, Biden created 13 judicial vacancies through the nomination and elevation of judges to higher courts.[19] While nominating a judge presently in the federal hierarchy may provide advantages in terms of previous Senate support and judge experience with the nomination process, presidents may understandably prefer to leave their own specific stamp on the Court of Appeals (and appear responsive to coalition preferences) by selecting nominees outside of the federal hierarchy.

Presidential Priorities

Prior to taking office, a presidential candidate can send clear and important signals to allies on the strategy she intends to pursue in filling federal judgeships, with apparently greater latitude in the post-Nuclear Senate. During his 2016 campaign, then-candidate Trump expressed his intention to work closely with conservative organizations such as The Heritage Foundation and Federalist Society to find judicial nominees (Diamond 2016). During the Trump Administration, then-executive vice president of the Federalist Society Leonard Leo played a primary role in identifying candidates for open judgeships (O'Harrow Jr. and Boburg 2019). These judges would presumably advance a conservative legal philosophy that includes an originalist constitutional perspective and a preference for reduced administrative power in a manner reminiscent of President Ronald Reagan's call for smaller government (Hollis-Brusky and Parry 2021, Hollis-Brusky 2015). All three of President Trump's Supreme Court appointments, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett were previously members of the Federalist Society. Additionally, approximately 90 percent of President Trump's circuit confirmations, and 46 percent

[19] "Biographical Directory of Article III Judges, 1789-present." Federal Judicial Center. https://www.fjc.gov/history/judges.

of his district confirmations were members of the Federalist Society (Choi, Gulati, and Posner 2023).

During his candidacy for the 2020 election, then-presidential candidate Biden signaled that demographic diversity was a priority for judicial nominees, most acutely with his call to nominate the first African American woman U.S. Supreme Court justice (Johnson 2021). Biden also met with advocacy groups to discuss the importance of increasing diversity of increase of nominees across the government (Cummings 2020). After his election, the Biden Administration would explicitly signal its adherence to the goal of nominee diversity in presidential announcements that noted how Biden's judicial nominees "continue to fulfill the President's promise to ensure that the nation's courts reflect the diversity that is one of our greatest assets as a country."[20]

As of July 31, 2024, 64 percent of Biden's confirmed judges have been women and 63 percent have been non-white. This is a marked departure from the demographics of President Trump's confirmed judges, 84 percent of whom were white, and 24 percent were women.[21] However, President Trump appointed more women to the bench than any previous Republican president (Gramlich 2021). The diversity of Biden's nominees also outpaced those of Obama during his first term. Approximately 40 percent of President Obama's confirmed judges were women, and approximately 40 percent were non-white. [22]

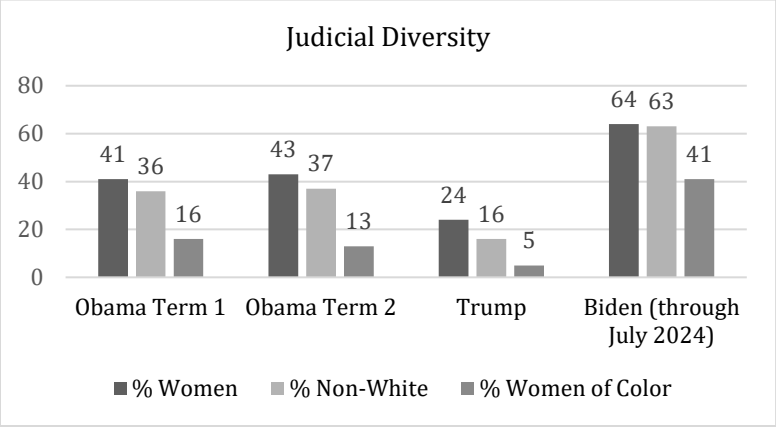
Diversity and representation matter in government positions matters for multiple reasons (Haire and Moyer 2015, Hofer, Scott and Achury 2021, Means 2019, Scherer 2023). The presence of descriptive representation, representation referring to a similarity of demographic characteristics

[20] President Biden Names Fifty-Second Round of Judicial Nominees. Presidential Actions. The White House. July 3, 2024. https://www.whitehouse.gov/briefing-room/presidential-actions/2024/07/03/president-biden-names-fifty-second-round-of-judicial-nominees/
[21] "Biographical Directory of Article III Judges, 1789-present." Federal Judicial Center. https://www.fjc.gov/history/judges.
[22] Ibid

between an official and the public (Pitkin 1967, Stout, Tate, Wilson 2021), can signal that government institutions are accessible and open to a variety of groups across society (Reddick, Nelson, and Paine 2009, Thurston 2019). Descriptive representation can also increase feelings of institutional legitimacy towards an institution (Scherer and Curry 2010) and support for officials with shared judicial characteristics (Badas and Stauffer 2018), particularly among individuals who are members of underrepresented groups (Scherer and Curry 2010),

Another significant aspect regarding President Biden's appointments is the number of women of color nominated and confirmed. As of July 31, 2024, approximately 40 percent of Biden's confirmed judges have been women of color (Table 5), nearly double the number of women of color appointed by President Obama during his first and second term respectively. Women of color occupy a unique nexus that operates at the intersection of gender and racial hierarchies, which combine to create unique personal and professional experiences (Crenshaw 1989, Means 2023, Moyer, Harris, Solberg 2022). Specifically, hurdles that women of color potentially traverse throughout their legal careers include experiences with bias, discrimination, and networking challenges that can result in the loss of women of color in the legal career pipeline (Brazelton and Chaffin-DeHaan 2019, Johnson 2021, Melaku 2019). Given these challenges, President Biden's impact on the percentage of women of color on the federal bench is notable.

Table 5. Appointments and Judicial Diversity [23]



Challenges and Strategy

The speed and success that the Biden Administration has experienced was aided by the administration's strategy of prioritizing federal judgeships in "friendly" blue states, to avoid blue slip opposition and delays from out-party senators (Raymond 2023). Although the filibuster is no longer an institutional tool that can block judges, the blue slip process still gives opposing senators influence on the character of judicial nominees. As part of the Senate's advice and consent responsibility, the president is expected to consult with the home state U.S. Senators of a given judicial nominee (Binder 2007, Black, Madonna, Owens 2014), particularly for district nominees (where the judge's seat is contained within state lines). This consultation between the president and U.S. Senators can involve the president's direct consideration of a senator's recommendation for nominee and/or also feedback during the blue slip process. The blue slip tradition, with origins dating back as early as the 1910s (Binder 2007), involves the Senate Judiciary Committee sending blue slips of paper to both home state senators for a given nominee. The senators can use the slips to report favorably or unfavorably on the nominee. Withholding of the blue slip is considered a way to render disapproval towards nominee. Binder (2007) explains that the blue slip process

[23] "Biographical Directory of Article III Judges, 1789-present." Federal Judicial Center. https://www.fjc.gov/history/judges.

essentially extended the process of senatorial courtesy, the practice of deferring to the preferences of home state senator of the *president's* party, to senators of both parties. While not a filibuster, blue slip opposition can stall a nominee even if the nominee has supermajority support.

The general practice is that judicial nominees that do not have the support of both home state senators will not receive consideration by the Senate Judiciary Committee; however, Senate Judiciary Chairpersons have historically adjusted the degree to which they consider blue slip opposition disqualifying (Binder 2007, Black, Madonna, Owens 2014, Tobias 2024). For example, in the face of increased resistance to President Carter's attempt to diversify the judiciary with more women and non-white nominees, Senate Judiciary Chairman Ted Kennedy (D-MA), allowed committee action on nominees even in the face of home state opposition (Black, Madonna, Owens 2014). Also, in 2017, Senate Judiciary Committee Chairman Charles Grassley altered the blue slip policy for U.S. Circuit nominees in that approval of both home state U.S. senators was not required for the nomination to proceed.[24]

This policy has remained in place during the Biden Administration under the leadership of Senate Judiciary Chairman Richard Durbin (D-IL). Blue slip approval for both Senators is still required for district court judges. Organizations supportive of the Biden Administration voiced criticism of Durbin's continued adherence to the blue slip policy for district nominees in the face of what some saw as strategic opposition by Republican senators to slow down the pace of Biden's judicial appointments (Thomsen 2023). For example, in October 2022, President Biden nominated state district attorney Scott Colom to the vacant seat for the Northern District of Mississippi (a

[24] "Judiciary Democrats Denounce Grassley Blue Slip Decision." U.S. Senate Committee on the Judiciary. November 11, 2017. https://www.judiciary.senate.gov/press/dem/releases/judiciary-democrats-denounce-grassley-blue-slip-decision .

state represented by two Republican senators).[25] Republican Mississippi Senator Roger Wicker reported favorably on Colom's nomination. Colom's nomination also received the support of Republican state officials such as former Republican Governors Phil Bryant and Haley Barbour (Vance 2023) However, Republican Mississippi Senator Cindy Hyde-Smith withheld her blue slip and later stated that she would not support his nomination (Pittman 2023). Colom's nomination expired at the end of 2023 and was returned to President Biden in January 2024.[26]

It is important to note that when Biden did venture into less "friendly" territory (states with 1 or no Democratic senators), these judicial nominees were often approved by above average margins (for recorded votes). Specifically, the average number of yes votes when viewing roll call votes for all Biden confirmed district nominees (through July 2024) in states with two Democratic senators is 53; however, the yes vote average for judicial nominees in states with at least 1 Republican senator is 67.[27] When removing the judges who received 80 or more yes votes (8), the average yes total for judges in states with two Democratic senators is 53 and the average for states with at least one Republican Senator is 60.4 ($p<0.01$). It is somewhat illustrative that 7 of 8 district judges who received over 80+ yes votes were in states with at least 1 Republican Senator. Although the filibuster is gone, this difference in vote totals suggests that Republican senators in those states were successful in influencing the nomination to get judges closer to minority party preferences.

[25] The seat was previously held by Judge Michael Mills (appointed by George W. Bush), who took senior status in November 2021.

[26] "Nominations Failed or returned to the President." United States Senate. https://www.senate.gov/legislative/nom_rtn.htm .

[27] The difference in vote margin is statistically significant the $p<0.01$ level. This figure focuses on district nominees as the two-senator blue slip rule is still active for district nominees. This figure excludes judges confirmed through voice and judges confirmed for districts in Washington, D.C. and Puerto Rico (13 total exclusions).

Shifting the Judiciary

Each successful judicial nomination contributes to a president's ability to shape-and tilt-the overall composition of the judiciary. When Biden entered office in 2021, a majority of district judges were appointed by Democratic presidents and to date, his judicial appointments have expanded that majority. Specifically, as of July 31, 2024, 367 of the 677 Article III district judgeships (54%) were occupied by Democratic appointee judges.[28] When Biden entered officed, a majority (approximately 54%) of Court of Appeals judgeships were occupied by Republican appointees (Russell 2024). As of July 2024, the Republican-appointee still maintain a slight advantage; however, Biden's appointments have narrowed the gap (a 51% Republican-appointee Circuit judges).[29]

Importantly, Biden has also been able to "flip" two Circuits from Republican-appointee to Democratic-appointee judicial majorities. Specifically, during the Trump Administration, the Court of Appeals for the Second Circuit flipped from Democratic-appointee majority to Republican-appointee majority with Trump's appointments of judges William Nardini and Steven Menashi in 2019.[30] However, Biden was able to quickly "reflip" the Second Circuit (Adler 2021) with his appointments of Eunice Lee, Myran Perez, and Beth Robinson during the first year of his presidency. The Court of Appeals for the Fourth Circuit also shifted to majority-Democratic appointee judges during Biden's term giving the Democratic a 7-6 advantage in terms of Circuit Court of Appeals with majority Democratic-appointee judges (Headly 2024).[31]

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[28] "Biographical Directory of Article III Judges, 1789-present." Federal Judicial Center. https://www.fjc.gov/history/judges.
[29] Ibid
[30] "51 Judges Named by Trump." March 14, 2020. The New York Times, https://www.nytimes.com/2020/03/14/us/appellate-judges-trump-appointees.html .
[31] As of July 2024. Democrat-appointee judges comprised the majority in the First, Second, Fourth, Ninth, Tenth Circuits. The D.C. Circuit and Federal Circuit for the Court of Appeals also have Democratic-appointee judge

While this discussion has focused on how Biden has been able to shape the composition of the judiciary in terms of judgeships; the consistent linkage between judicial ideology and vote outcomes (Hübert and Corpus 2022, Segal and Spaeth 2002) would bode favorably for Biden or subsequent Democratic presidents in lower federal court. Specifically, individual judicial decisions by federal judges across the federal hierarchy create a tenor of federal jurisprudence that can push aggregate outcomes in an ideologically conservative or liberal direction (Manning, Carp, and Holmes 2020) decades after the appointing president has left office, which for Biden, would help the endurance of his administration's priorities.

However, it is also important to stress challenges regarding the nominees who shape the judiciary. A clear aspect of Biden's legacy will be his impact on the diversity of the federal judiciary. But as noted earlier, a key challenge has been with district seats in red states or circuit seats with Republican home state senators for the judicial nominee. Biden's replacement of a Democratic-appointed judge with his nominee helps entrench the Democrat's party hold a given seat; however, the ability to transfer a seat from Republican to Democratic-appointee control is what truly expands one party's numerical advantage in federal judiciary. For example, during his term Biden has appointed two women of color to seats on the Court of Appeals for the Fifth Circuit, judges Dana Marie Douglas and Irma Carrillo Ramirez. However, these appointments did not change the balance of power of the traditionally conservative Fifth Circuit given that Douglas and Ramirez replaced two judges who were previously appointed by President Obama (Choi 2023, Raymond 2022).

majorities. "Biographical Directory of Article III Judges, 1789-present." Federal Judicial Center. https://www.fjc.gov/history/judges.

A second challenge is that even with numerical advantages, strategic litigants can take advantage of "vulnerabilities" in the judicial map to advance a legal agenda that challenges the priorities of the sitting president. For example, litigants hoping to disrupt a presidential agenda can file legal challenges in districts nested within circuits where the majority of judges are appointed by out-party presidents. This has been case with the conservative Fifth Circuit, which has ruled against Biden Administration preferences in high-profile disputes involving gun laws, immigration, and reproductive rights (Barnes and Marimow 2023). Oppositional decisions by a federal circuit can be particularly problematic for a president if the circuit issues nation-wide injunctions against the implementation of a president's policy (Bond and Escobar 2023).

In addition, and as will be discussed in the next section, even if lower federal court judges have sincere preferences congruent to those of the sitting president, the presence of an ideologically distant high court (in the case the Supreme Court) can hinder a president's ability to govern through administrative means.

"PULLED BACK?": RESTRAINING THE ADMINISTRATIVE STATE

In response to the U.S. Supreme Court's ruling in the case of *Loper Bright Enterprises et al v. Raimondo Secretary of Commerce*, et al (2024)[32], which overturned *Chevron*[33] deference to agency decision-making, Justice Elena Kagan argued in her dissent:

> The majority's argument is a bootstrap. This Court has "avoided deferring under *Chevron* since 2016"… because it has been preparing to overrule *Chevron* since around that time. That kind of self-help on the way to reversing precedent has become almost routine at this Court. Stop applying a decision where one should; "throw some gratuitous criticisms into a couple of opinions"; issue a few separate writings "question[ing the decision's] premises"…; give the whole process a few years . . . and voila!—you have a justification for overruling the decision (*Loper Bright et al v. Raimond Secretary of Commerce*, at 26, Kagan, dissenting).[34]

Kagan is essentially asserting the outcome in *Loper Bright* is not just a legal conclusion, but rather the culmination of a long-term coordinated effort by members of the Court opposed to the *Chevron* precedent (Epstein and Brown 2023). Specifically, the *Chevron* doctrine, operating precedent between 1984-2024, involved a two-step process to help judges determine how to rule in cases involving agency interpretation of congressional statutes. The first step involves assessing whether Congress has spoken clearly on the issue/action under question. If Congress has clearly addressed the issue, the Court explained that judges and agencies "must give effect to the unambiguously expressed intent of Congress.[35] However, if Congress is ambiguous or silent on the issue under question, judges are expected to defer to a reasonable or "permissible" agency interpretation of the statute.[36] The ruling in *Loper Bright* attracted substantial attention and discussions of its potential consequences, particularly given that thousands of lower court decisions rested on the application of *Chevron* deference (Pemberton and Pope 2024). One concern from supporters of *Chevron*

[32] 144 S. Ct. 2244 (2024), Consolidated with *Relentless, Inc.* v *Department of Commerce*
[33] *Chevron U.S.A., Inc*. v. *NRDC*, 467 U.S. 837 (1984)
[34] *Loper Bright Enterprises et al v. Raimondo Secretary of Commerce*, at 26 (Kagan, J. dissenting)
[35] *Chevron U.S.A., Inc*. v. *NRDC* , at 842.
[36] *Chevron U.S.A., Inc*. v. *NRDC* , at 866.

deference was that motivated litigants would try to force federal courts to revisit seemingly settle judicial assessments of agency decision-making (Bogage 2024).

Loper Bright is just one of multiple Supreme Court decisions that defined what some labeled as an antagonistic relationship between the Supreme Court and the Biden Administration (Biskupic 2023). This section will provide an overview of Supreme Court decision-making in cases involving administrative agencies during the Biden Administration presidency.

I will also discuss the long-term implications of Supreme Court decision-making for presidents wishing to enact significant policy through administrative means. Specifically, the overturning of *Chevron* directs lower federal courts to adjust how they monitor executive branch decisions. This adjustment could purportedly produce greater legal investigation and scrutiny toward agency decision-making. However, if a court prefers a constrained administrative state, rulings directed toward judicial behavior (i.e. *Loper Bright*) *and* executive actor behavior (i.e. *Biden v. Nebraska,* overturning student debt relief) are necessary to supplement each other in the case of inadequate compliance (Songer, Segal, and Cameron 1994, Spriggs 1997) to Supreme Court preferences from either institutional actor. Additionally, through decisions such as *Corner Post*, *Inc*., the Supreme Court can develop "judicially-created fire-alarm mechanisms" by directly providing litigants with enhanced legal capability to challenge agency decisions.

The Supreme Court, Administrative Agencies, and the Biden Administration

Despite advantages in resources, litigation selectivity, and extensive experience navigating legal disputes (Galantar 1974, Smith 2007, Yates 2012), recent research shows a depreciable decline in the win rates of federal executive branch agency litigants appearing before the Supreme Court (Epstein and Posner 2018, Epstein and Brown 2023). Factors potentially contributing to this decline include the growth/rise of highly qualified litigators challenging executive branch action,

and perhaps "overreach" on the part of the executive branch (Epstein and Posner 2018). Epstein and Brown (2023) examine all orally argued Supreme Court cases involving the executive branch (agencies and the president directly) occurring between the 1937-1938 term and the 2021-2022. Epstein and Brown (2023), show that the decline in win rates for the executive branch appears to be an artifact of the Roberts Court specifically. Overall, the Roberts Court ruled in favor of the executive branch in 52% of cases, which is lower than the average of 65% across the entire dataset.

To provide an assessment of Biden Administration success (and loss) when appearing before the Supreme Court, using the Supreme Court Database (Spaeth, Epstein et al 2024),[37] I reviewed all Supreme Court cases with oral arguments between the 2020 and 2023 Supreme Court Terms and isolated disputes involving administrative agencies, independent commissions, and agency actors as litigants during the Biden Administration.[38] For the 2020 Supreme Court Term, only cases that were argued after President Biden took office in January 2021 are included in the sample.[39] Given the focus of my discussion on civil administrative litigation, cases involving the U.S. government as a litigant involved in federal criminal prosecution are excluded from this sample. Consolidated cases are counted as one case. The Supreme Court issued 203 opinions in cases with oral arguments between February 2021 and July 2024. Of these cases 56, fall within my executive branch sample.[4041] I reviewed each case to determine whether the Supreme Court ruled

[37] Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2024 Supreme Court Database, Version 2024 Release 01. URL: http://supremecourtdatabase.org .
[38] Cases involving actions by an administrative agency where the President is listed as a litigant (i.e. *Biden v. Nebraska*) are also included.
[39] This would include cases argued before the Supreme Court between February 2021 and May 2021.
[40] See Appendix for Case List.
[41] The case of *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association* is not included in this sample. This case involved the Supreme Court overturning the lower circuit decision, and *upholding* the validity of EPA decision-making under the Trump Administration. In this dispute, however, the Biden Administration preferred that the Supreme Court **not** grant cert to hear this case. "Brief for the Federal Respondent in Opposition." *HollyFrontier Cheyenne Refining. LLC v. Renewable Fuels Association*. On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. https://www.justice.gov/d9/briefs/2020/12/17/20-472_hollyfrontier_opp.pdf.

in favor of the position advocated by the executive branch. When viewing Biden Administration outcomes, the Supreme Court ruled in favor of the government in 55% percent of cases.

While much attention has been given to the prevalence of 6-3 or 5-4 splits on the Court, 50% of these cases received at least 7 votes for the majority outcome, and 36% of cases outcomes were unanimous. The Court exhibited a slightly higher rate of unanimity when ruling against the government. Forty-four percent of unfavorable government decisions were unanimous, and 29% of decisions were unanimous when ruling in favor of the government (however, this difference is not statistically significant).

Twenty-eight percent of the cases involved 6-3 splits, with most (10) involving a majority composed of the Republican-appointee justices aligned against the Democratic appointee justices.[42] In addition to *Corner Post, Inc*., and *Biden v. Nebraska*, these 10 cases also included a high-profile EPA ruling. Specifically, In *West Virginia v. Environmental Protection Agency* (2022), the majority determined that a proposed EPA greenhouse gas reduction plan extended beyond the statutory authority of the agency.[43]

Selectivity in the decision to appeal has often been one contributor to the government's success rate, and the difference in outcome for the government when petitioning versus when appearing before the Court as the respondent is stark. When the government petitioned the Supreme Court (27/56 cases), they were successful in 74% of cases. However, when appearing as the respondent, the success rate drops to 38% (a statistically significant difference, $p<0.01$).

Lastly, when reviewing administrative agency outcomes, it is important not to equate a government loss during the Biden Administration as a conservative outcome. Importantly, several

[42] Justice Jackson did not take part in consideration of *Loper Bright Enterprises et al v. Raimondo Secretary of Commerce* (6-2), but did take part in *Relentless, Inc. v Department of Commerce* (6-3).
[43] 142 S. Ct. 2587 (2022)

cases in which the Biden Administration lost included wins for what would be considered "underdog" litigants challenging agency action, and hence a liberal outcome. I reviewed the Supreme Court Database to assess the ideological outcome for the cases in my sample (Epstein and Brown 2023). Liberal outcomes include pro-underdog, pro-civil rights claimant, anti-government due process outcomes, pro-consumer, anti-employer, and pro-environmental protection outcomes whereas conservative outcomes would reflect the reverse.[44] Sixty-four percent of the outcomes in the sample are categorized as conservative.[45]Interestingly, and as would be the case for most administrations, liberal judicial outcomes are associated with a lower win rate for the executive branch. Specifically, for cases in the sample with liberal outcomes, 45% (9/20) were in favor of the government's position. For cases that reflected a conservative outcome, 60% (21/35) were supportive of the government's positions. It is important to note that given the resource and status differential of many who challenge government action, the posture of the government's position (defense of the status quo) will often be conservative even for administrations with liberal policy preferences.

Litigation can obviously take a long time to reach the Supreme Court from its start date, therefore most of the cases decided by the Supreme Court involved actions initiated under prior administrations (Smith 2007). Twelve cases in the sample involved specific actions taken by the Biden Administration executive branch.[46] Similar to the larger sample of agency cases, the Supreme Court ruled in favor of the government in half of the cases. In multiple cases involving direct Biden Administration activity, conservative justices raised concern regarding whether the

[44] Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2024 Supreme Court Database, Version 2024 Release 01
http://scdb.wustl.edu/_brickFiles/2024_01/SCDB_2024_01_codebook.pdf.
[45] The directional outcome in the case of *United States v. Arthrex, Inc* is coded as unclear and excluded for this calculation.
[46]The case of *Food and Drug Administration v. Alliance for Hippocratic Medicine* 144 S. Ct. 1540 (2024) involved direct agency actions occurring in the Biden Administration (a 2021 regulation) and prior administrations.

Administration was attempting to govern with more authority than statutorily allowed. Using the Major Questions Doctrine[47], which has the capacity to restrict administrative power at its apex (Hickey, Johnson, and Small 2024), the conservative majority clearly communicated that greater executive branch restraint was needed.

Biden Administration Activity and the Major Questions Doctrine

When running for office, Biden campaigned on effective management and mitigation of the COVID-19 pandemic (Aubrey 2020). Soon after entering office, the Biden Administration quickly attempted to implement prevention measures aimed at reducing the spread of the virus and advancing economic relief (according to the administration). The Biden Administration quickly found their vaccine requirements and housing moratorium policies challenged in court.

The Biden Administration and COVID Policy

In 2021, the Department of Health and Human Services (HHS) issued a ruled requiring vaccine testing for individuals working in facilities that received Medicaid and Medicare funding.[48] The rule would have affected millions of healthcare workers. Those granted exceptions (for religious or medical reasons) from the vaccine policy would have to undertake regular COVID testing. Non-compliance with the new rule could result in a loss of Medicaid/Medicare funding. Injunctions were issued by two district courts blocking enforcement of the rule at the request of multiple litigants. The government petitioned the Supreme Court and in a *per curiam* opinion, the Supreme Court allowed enforcement of the HHS rule, noting the policy was well within the authority of the agency. However, Justice Thomas, joined by Justices Alito, Gorsuch, and Barrett dissented, arguing that the vaccine rule did not fall within the agency's mandate from Congress. Thomas asserted, "Had Congress wanted to grant CMS power to impose a vaccine mandate across

[47] *MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218 (1994)
[48] *Biden v. Missouri*, 142 S. Ct. 647 (2022)

all facility types, it would have done what is has done elsewhere-specifically authorize one."[49] This perspective regarding the need for the *explicit* congressional authorize for far reaching administrative initiatives would re-emerge multiple times in cases involving the Biden Administration, but with the executive being less successful.

In a very similar case to *Biden v. Missouri* (2022), the Supreme Court reviewed a COVID rule directed toward vaccine compliance. Specifically, in the case of *National Federation of Independent Business, et al. v Department of Labor* (2022), the Supreme Court reviewed a rule issued by the Department of Labor that required vaccines for individuals working in businesses with more than 100 employees. The rule would have potentially affected approximately 80 million employees. The Department of Labor argued that the vaccine policy fell within the Office of Safety and Health Administration's (OSHA) jurisdiction of developing workplace safety standards. However, the Court's *per curiam* opinion supported by the 6 conservative justices, explicitly applied the Major Questions Doctrine (MQD) and ruled against the Biden Administration. According to the majority, the Major Questions Doctrine requires that ""Congress…speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance.""[50] The assumption underlying the doctrine is that Congress would not be "vague" or "ambiguous" about broad grants of authority to agencies (Bowers 2022, 1). According to the Court, OSHA's rule fits this categorization of economic and political significance given the potential number of individuals covered by the policy, and the majority could not find explicit authorization for a rule of such scope. The dissent disagreed, however, and

[49] *Biden v. Missouri*, at 4 (Thomas, J. dissenting)
[50] *National Federation of Independent Business, et al. v Department of Labor,* at 6.

the scope of the rule reflected the scope of the COVID crisis and was not an overreach of OSHA's authority.[51][52]

The Biden Administration and Student Loan Debt

Finally, another one of Biden's signature campaign promises, student loan debate relief, would fall in a 6-3 decision where the majority applied the Major Questions Doctrine. Specifically, during his 2020 presidential campaign, then-candidate Biden pledged to alleviate student loan debt for millions of borrowers (SoRelle and Laws 2024). Once in office, the Administration attempted to implement this promise in multiple ways. This included discharging the debt of individual with permanent disabilities and easing the rules of the Public Service Loan Forgiveness program, which was intended to forgive student loan debt of individuals with 10 years of public service (Turner 2021).[53] However, the most controversial prong of student loan debt forgiveness plan involved Biden's Secretary of Education program to cancel approximately $430 billion dollars in student loan debt under the Higher Education Relief Opportunities for Student Act (HEROES) of 2003. Specifically, the HEROES Act, included a provision that allowed the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial

[51] *National Federation of Independent Business, et al. v Department of Labor*, at 10 (Breyer, J., Sotomayor, J. and Kagan, J., dissenting)

[52]The Major Questions Doctrine also emerged in another Supreme Court case involving a Biden Administration COVID policy. Specifically, the Court applied the MQD in the case of *Alabama Assn or Realtors v. Department of Health and Human Services* (2021), involving an eviction moratorium imposed by the Centers for Disease Control. In a *per curiam* opinion, the Court noted that the eviction moratorium could cover between "6 and 17 million tenants at risk of eviction" (*Alabama Assn or Realtors v. Department of Health and Human Services*, at 6) and likely exceeds the statutory authority of the CDC. The Court noted: "It is indisputable that the public has a strong interest in combating the spread of the COVID-19 variant. But our system does not permit agencies to act unlawfully even in the pursuit of desirable ends." (*Alabama Assn or Realtors v. Department of Health and Human Services*, at 8). Justices Breyer, Kagan, and Sotomayor dissented from the opinion. This dispute was an application to vacate a stay issued by lower court and was decided without oral argument and is not included in Biden Administration Supreme Court cases total.

[53] "FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need it Most." The White House. August 24, 2022. https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.

assistance programs" under the Education Act of 1965 "in connection with a war or other military operation or national emergency."[54]

However, in invoking the Major Questions Doctrine, the Court ruled that the plan, which would have cancelled or lowered the student loan debt of approximately 43 million individuals, far exceeding the authority delegated to the Secretary of Education in the Act. The majority reiterated the need for explicit congressional authorization for the enactment of administrative policy of "economic and political significance." [55]

While the ruling in *Biden v. Nebraska* was a clear setback to the Biden administrative and substantive agenda, the Biden Administration exhibited responsiveness to the Court's directive by attempting to implement student loan debt on a decidedly smaller scale. In August 2023, the Biden Administration worked to implement its campaign promise of lower student loan debt through the Saving on a Valuable Education (SAVE) Program, which would use a borrower's income to calculate student loan payments with a path toward loan forgiveness.[56] However, even these attempts at piecemeal debt relief policy faced legal challenges and numerous federal courts blocked various components of Biden's attempts of revised debt forgiveness policies (Bernard 2024).

The use of the Major Questions Doctrine by the conservative majority is just one component of the apparent judicial push to restrain administrative authority. Viewed from the perspective of institutional compliance and responsiveness (Spriggs 1997), the repeated use of the Major Questions Doctrine works to directly communicate to executive branch actors, across policy

[54] *Biden v. Nebraska*, at 13.
[55] *Biden v. Nebraska*, at 20.
[56] FACT SHEET: The Biden-Harris Administration Launches the SAVE Plan, the Most Affordable Student Loan Repayment Plan Ever to Lower Monthly Payments for Millions of Borrowers." Statements and Releases. The White House. August 22, 2023. https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/22/fact-sheet-the-biden-harris-administration-launches-the-save-plan-the-most-affordable-student-loan-repayment-plan-ever-to-lower-monthly-payments-for-millions-of-borrowers/.

areas, that greater administrative caution is needed when developing regulatory policies. And existing research shows that agencies will sometimes adjust the substance and frequency of their decisions and rules in unfavorable judicial environments (Canes-Wrone 2003, Thrower 2017b), which suggests that some administrations could take pre-emptive steps to avoid the reach of the MQD.

Importantly, while the decisions involving MQD provide guidance to lower courts on how to review broad assertions of administrative authority, I argue that the primary audience of these opinions are *executive* branch actors, given the Courts repeated admonishment of agencies purportedly moving beyond their authority in their interpretation of congressional statutes. However, in altering the trajectory of administrative authority, the Court requires an effective legal vehicle that demands routinized and widespread adjustment of lower *judicial* behavior. The dispute in *Loper Bright* provided this vehicle.

Chevron, Loper Bright and Relentless

Prior to the commencement of litigation in *Loper Bright,* scholars noted increasing opposition and criticism of the deference established in *Chevron* (Green 2021, Hollis-Brusky and Parry 2021). While there was previous support among conservatives for the 1984 *Chevron* as the way to induce greater deference to Reagan Administration goals (Green 2021), overtime *Chevron* became a target for those expressing concerns about the growth in policy-making through administrative means. As Justice Kagan noted in her earlier quote, the Supreme Court stopped citing *Chevron* nearly a decade prior to the decision in *Loper Bright.* Importantly, even if individual justices are opposed to sustaining an existing precedent, the presence of clear supermajority is arguably an important ingredient for a Court to shift from *ignoring* a precedent to explicitly *overruling* said precedent. The size of the majority is not just important for conveying

legitimacy to contemporary audiences (Spriggs and Hansford 2001, Zink, Spriggs, and Scott 2009), but also precedents with larger coalitions are usually less likely to be overruled in the future (Spriggs and Hansford 2001). The timing of the *Loper Bright* dispute coincided with a clear conservative supermajority on the Court. At issue was a rule issued by the National Marine Fisheries Service (NMFS), a bureau of the Department of Commerce, which required some sea vessels to carry observers on board "for the purposes of collecting data necessary for the conservation and management of the fishery."[57] Plaintiffs in the case were required to cover the cost of having observers aboard (approximately $700 per day). The rule was challenged in the D.C. Circuit and First Circuit, with both circuits applying *Chevron* in upholding the validity the rule.

In terms of their review of *Chevron* deference, the Court could have narrowed or clarified applications of *Chevron*, similar to their approach with *Auer* deference. In *Auer v. Robbins* (1997)[58], the Supreme Court ruled that courts should defer to reasonable agency interpretations of ambiguous agency regulations. However, later in a 5-4 decision in *Kisor v. Wilkie* (2019)[59]the Court clarified the scope of *Auer* deference emphasizing that first a rule must be "genuinely ambiguous"[60] with a court exhausting all "traditional tools of construction."[61] Justices Thomas, Alito, Kavanaugh, and Gorsuch preferred that *Auer* deference be overruled.

In their ruling overturning *Chevron*, the majority explained that the Administrative Procedure Act (APA) did not allow courts to defer agency interpretation of ambiguous statutes. The majority highlighted APA language stating that courts are responsible for deciding "all

[57] *Loper Bright Enterprises et al v. Raimondo Secretary of Commerce,* at 3.
[58] *Auer v. Robbins*, 519 U.S. 452 (1997)
[59] *Kisor v. Wilkie,* 139 S. Ct. 2400 (2019)
[60] Ibid, at 11
[61] Ibid, at 14

relevant questions of law."[62] Importantly, the majority noted that lower courts could still consider agency statutory interpretation as one of many factors in determining the validity of the agency application/interpretation.[63] The majority also attempted to assuage concerns of legal upheaval by noting that the decision in *Loper Bright* should not be viewed as an invitation to disrupt or disturb previous agency decisions that rested on Chevron deference. However, given existing research noting how Supreme Court behavior can affect subsequent litigant behavior (Baird 2007), it would be surprising to *not* see an impact from *Loper Bright* on challenges to agency decision-making. The Supreme Court is sending explicit signals of a judicial hierarchy that is more receptive to reversal of agency authority.

Executive-Judicial Signaling: MQD and Loper Bright

Whereas the Major Questions Doctrine explicitly cautions agencies about their statutory interpretation, *Loper Bright* explicitly redirects judicial behavior in a way that calls for greater court interrogation of agency decision-making. Taken together, *Loper Bright* affects judicial interrogation of *all* scopes of agency behavior, and potentially works to trigger the Major Questions Doctrine analysis for agency actions of broad scope, likely to the detriment of the agency under review. Empirical research on *Chevron* shows higher agency win rates in circuit courts when *Chevron* was applied (Barnett and Walker 2017). Importantly, judges who are partial towards taking a deferential posture to agency decision-making could reproduce *Chevron*-like outcomes by ruling in favor of agencies with decisions scaffolded by more extensive legal rationale (Barnett and Walker 2017). This would technically represent compliance with court directives, but not necessarily produce the outcome of restrained executive authority, hence, the need to

[62] *Loper Bright Enterprises et al v. Raimondo Secretary of Commerce,* at 14.
[63] Ibid, at 35

simultaneously and directly signal the executive branch to practice self-restraint, through mechanisms such as the Major Questions Doctrine.

Additionally, key to ensuring that executive and judicial actors are responsive to the Supreme Court directives is the presence of adequate monitoring capacity on the part of litigants to alert the Court of inefficient compliance, which I discuss below.

Litigant Access, *Corners Post and* "Fire Alarms"

Through its cert decisions and decisions on the merits, the Supreme Court has the ability to shape its agenda by signaling to litigants cases of interest to the Court, and likely case outcomes (Baird 2004, 2007; Jacobi 2008, Rice 2014, 2020). According to Baird (2004, 757), "justices rely on the ability of litigants to pay attention the cues contained within previous cases to make effective, comprehensive policy." The mechanism and relationship described by Baird (2004) is technically "indirect" as the Court is not making direct and explicit appeals to litigants to bring cases. However, in addition to this signaling relationship, the Court can directly *expand* the legal capability of litigants to challenge decisions made by federal administrative actors.

The Supreme Court made several decisions during the Biden Administration that directly affected litigant access to challenge agency decisions. For example, in the case of *Santos-Zacaria v. Garland* (2023),[64] the Fifth Circuit ruled that petitioner Santos-Zacaria failed to properly exhaust administrative remedies when appealing a removal order before the Board of Immigration Appeals, in part because she failed to seek a discretionary motion for reconsideration after the Board's decision. A decision that a litigant did not properly exhaust administrative remedies could restrict that litigant's access to a subsequent reviewing judicial venue. However, in a unanimous decision, the Supreme Court disagreed with the Fifth Circuit and ruled that the

[64] 143 S. Ct. 1103 (2023)

government erred in its interpretation that existing law required Santos-Zacaria to seek a motion for consideration.

Similarly, in the case of *Harrow v. Department of Defense* (2024)[65], a unanimous Supreme Court vacated a ruling by the U.S. Court of Appeals Federal Circuit that blocked a litigant's ability to challenge a decision by the Merit Systems Protection Board. The Federal Circuit ruled that the litigant failed to meet the deadline to contest the MSPB decision and the court therefore lacked jurisdiction.[66] However, the Supreme Court explained that the 60-day deadline to appeal MSPB allows for "equitable reasons" for exceptions.[67] Interestingly, while the Supreme Court outcomes in *Santos-Zacaria* and *Harrow* were contrary to the positions advocated by the Biden Administration, they arguably represent *liberal* outcomes given the decisions in favor of apparent litigant "underdogs"-an immigrant under threat of removal and a furloughed government employee.

Congressional scholars have noted that legislators can introduce mechanisms into legislation that allows for outside actors to monitor executive branch activity and raise a "fire alarm" if administrative actors seemingly stray outside of congressional expectations (McCubbins and Schwartz 1984). These mechanisms can include the ability of the public to comment on proposed administrative activity (Dwidar 2021, Balla 1998) and the inclusion of judicial review provisions that allow the public to challenge agency action in court (McCann, Shipan, Wang 2023, McCubbins, Noll, Weingast 1987). Relative to judicial institutions, litigants play a key role in alerting the Supreme Court of inadequate compliance to Supreme Court directives (Songer, Segal,

[65] 144 S. Ct. 1178 (2024)
[66] Harrow was furloughed in 2013 and filed an appeal of the furlough decision. His appeal was upheld by an administrative law judge in 2016. Harrow appealed that decision to the full MPSB; however, a decision was not made by the Board until 2022. Harrow did not receive the notice because in the interim he changed his email address.
[67] *Harrow v. Department of Defense*, at 3.

Cameron 1994). The Supreme Court's decisions in *Corner Post, Inc v. Board of Governors the Federal Reserve System*[68], is particularly significant in its capacity to create an enhanced "fire-alarm" mechanism that facilitates heightened litigant monitoring of administrative rulemaking.

At issue in *Corner Post, Inc.* was the ability of a litigant to initiate a facial challenge to an agency rule. A facial challenge refers to a plaintiff's challenge to the way in which a rule (or statute) is *constructed*. This is distinct from an "as-applied" challenge, which challenges a specific *application* of rule (Kreit 2009). Specifically, the Administrative Procedure Act (APA), provides for judicial review of agency decision (adjudication and rulemaking), with 28 U.S.C. § 2401(a) dictating the time frame to bring such claims. When considering facial challenges, most federal circuits interpreted 28 U.S.C. § 2401(a) as requiring facial challenges to agency rules to be brought six years after *final agency action* on the rule.[69] The rule at the center of *Corner Post, Inc.* was published by the Board of Governors in 2011 and concerned debit card fees rate assessed to merchants for each transaction. Plaintiffs challenging the Board's rates argued the fees were higher than dictated by the controlling statute. *Corner Post, Inc.* brought its suit in 2021, ten years after the finality of the rule.

The federal district court ruled that the complaint was brought beyond the applicable statute of limitations and dismissed the suit. A decision that was affirmed by the Eighth Circuit. However, in a 6-3 decision, the conservative majority ruled that the statute of limitations for facial challenges extends to six years after the plaintiff is *injured* by the final agency action. This distinction is significant in that allows a potential litigant to bring a facial challenge, which could lead to the invalidation of a rule, years (and perhaps decades) after the rule's finalization. This concern of an

[68] 144 S. Ct. 2440 (2024)
[69] 28 U.S.C. § 2401(a) states, "…every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

upswell of litigation was echoed by the dissent, with Justice Jackson writing "The tsunami of lawsuits against agencies that the court's holding in this case and *Loper Bright* have authorized has the potential to devastate the function of the federal government."[70] The impact on litigation from the *Corner Post* decision, has yet to be seen; however, from the perspective of court working to constrain administrative activity, expanding time frame to challenge agency rules provides a litigant mechanism that can highlight inadequate or inconsistent compliance from courts and executive actors potentially resistant recent directives from the Supreme Court. It also allows for the review of older agency rules previously considered out of reach for litigants because of access restrictions.

CONCLUSION

At the conclusion of the most recent Supreme Court term, President Biden published an op-ed in the *Washington Post* calling for reforms to the nation's highest court. He wrote:

> The United States is the only major constitutional democracy that gives lifetime seats to its high court. Term limits would help ensure that the court's membership changes with some regularity. That would make timing for court nominations more predictable and less arbitrary. It would reduce the chance that any single presidency radically alters the makeup of the court for generations to come. I support a system in which the president would appoint a justice every two years to spend 18 years in active service on the Supreme Court.[71]

This language marked a significant departure from President Biden's orientation towards the Court at the beginning of this term. Biden did commission a study on Supreme Court reform after taking office (Totenberg 2021); however, he personally did not advocate for adjusting the size of the Court or term length changes. A substantial portion of his comments in the op-ed addressed the Supreme

[70] *Corner Post, Inc. v Board of Governors*, at 23 (Jackson, J., dissenting)
[71] Joseph Biden: My plan to reform the Supreme Court and ensure no president is above the law. July 29, 2024. The Washington Post, https://www.washingtonpost.com/opinions/2024/07/29/joe-biden-reform-supreme-court-presidential-immunity-plan-announcement/.

Court's ruling in *Trump v. United States* (2024)[72] where a 6-3 majority ruled that presidents are immune from prosecution for actions related to official acts of the presidency. He was also critical of the Court's willingness to overturn precedent. While in that regard he only specifically referenced *Roe v. Wade*, the Court's overturning of *Chevron* precedent a few weeks earlier potentially also fueled President Biden's shift in tone.

This discussion has highlighted the unique and interdependent relationship between the presidency and the federal judiciary. One of the president's most visible endearing impacts is their determination on who sits on the federal bench. The removal of the filibuster on judicial appointments lifted an important obstacle for presidents working to craft a judiciary to their preferences; however, presidents still must navigate challenges such as the location and availability of vacancies upon entering office, and blue-slip resistance from out-party senators. Despite these challenges, President Biden is currently on pace to have one of the highest totals of judges confirmed during a single term.

These judges could collectively work to shift aggregate court outcomes, particularly administrative outcomes, in a direction reflective of Biden Administration preferences long after his departure from office. However, the current Supreme Court majority has sent multiple explicit legal signals to actors central to administrative litigation (executive branch actors, judicial actors, and litigants) that do *not* communicate receptivity to expansive administrative policymaking. And with a 6-3 Republican-appointee majority, and likely to the frustration of the Biden Administration, the tone of these legal signals is unlikely to change without a multi-member shift in the Court's makeup.

[72] 144 S. Ct. 2312

REFERENCES

Adler, Madison. 2021. “Historic LGBT Confirmation Gives Biden Second Circuit Flip.” November 1, 2021. *Bloomberg Law*, https://news.bloomberglaw.com/us-law-week/biden-flips-second-circuit-with-first-lgbt-woman-appellate-judge

Andrade-Rhoades, Amanda. 2021. “Biden pick Florence Pan confirmed as first Asian American woman on D.C. federal court.” September 24, 2021. *NBC News*, https://www.nbcnews.com/news/asian-america/biden-pick-florence-pan-confirmed-first-asian-american-woman-dc-federa-rcna2255

Aubrey, Allison. 2020. “Coronavirus is a Key Campaign Issue: What’s Joe Biden’s Plan?” October 28, 2020. *NPR*. https://www.npr.org/sections/health-shots/2020/10/28/928392673/coronavirus-is-a-key-campaign-issue-whats-joe-biden-s-plan

Badas, Alex, and Katelyn E. Stauffer.2018. "Someone like me: Descriptive representation and support for supreme court nominees." *Political Research Quarterly* 71 (1): 127-142.

Baird, Vanessa, and Tonja Jacobi. "Judicial agenda setting through signaling and strategic litigant responses." *Wash. UJL & Pol'y* 29 (2009): 215.

Baird, Vanessa A.2007. *Answering the call of the court: How justices and litigants set the Supreme Court agenda*. University of Virginia Press

Baird, Vanessa A.2004 "The effect of politically salient decisions on the US Supreme Court's agenda." *The Journal of Politics* 66 (3): 755-772.

Balla, S. J. 1998. Administrative procedures and political control of the bureaucracy. *American Political Science Review*, *92*(3), 663-673.

Barnett, Kent, and Christopher J. Walker. "Chevron in the circuit courts." *Mich. L. Rev.* 116 (2017): 1.

Barnes, Robert and Ann E. Marimow. 2023. “This conservative appeals court’s rulings are

testing the Supreme Court." October, 26. 2023.https://www.washingtonpost.com/politics/2023/10/26/5th-circuit-supreme-court-reversals-decisions/

Bartels, Brandon L. 2015"The sources and consequences of polarization in the US Supreme Court." *American gridlock: The sources, character, and impact of political polarization* 171 (2015): 177.

Black, Ryan C., Anthony J. Madonna, and Ryan J. Owens. "Qualifications or Philosophy? The Use of Blue Slips in a Polarized Era." *Presidential Studies Quarterly* 44, no. 2 (2014): 290-308.

Brazelton, Shenita and LaTasha Chaffin-DeHaan.2019. "Diversity Abound: Will Federal Judicial Appointees Mirror a Changing Citizenry." Samantha L. Hernandez and Sharon A. Navarro eds. Race, Gender, Sexuality, and the Politics of the American Judiciary. Cambridge University Press

Binder, Sarah A. 2007. "Where do institutions come from? Exploring the origins of the senate blue slip." *Studies in American Political Development* 21(1): 1-15.

Binder, Sarah A., and Forrest Maltzman.2009. *Advice and dissent: The struggle to shape the federal judiciary*. Rowman & Littlefield

Binder, Sarah A., and Forrest Maltzman. 2002. "Senatorial Delay in Confirming Federal Judges, 1947–1998." *American Journal of Political Science* 46(1): 190–9.

Biskupic, Joan. 2023. "The nonstop sparring match between the conservative justice and liberal Biden attorney at the Supreme Court." November, 6, 2023. https://www.cnn.com/2023/11/06/politics/alito-prelogar-supreme-court-analysis/index.html

Bogage, Jacob. 2024. “8 policies that could be vulnerable to new legal challenges.” July 5, 2024. *The Washington Post*. https://www.washingtonpost.com/business/2024/07/05/chevron-doctrine-overturned-regulations-vulnerable-supreme-court/

Bond, Shannon and Natalie Escobar. 2023. Appeals court slaps Biden administration for contact with social media companies. September 8, 2023. *NPR*, https://www.npr.org/2023/09/08/1197971952/biden-administration-fifth-circuit-ruling-social-media-injunction

Boyd, Christina L., Michael S. Lynch, and Anthony J. Madonna. 2015."Nuclear fallout: Investigating the effect of senate procedural reform on judicial nominations." *The Forum*, vol. 13(4)pp. 623-641.

Brown, Rebecca L., and Lee Epstein. 2023. "Is the US Supreme Court a reliable backstop for an overreaching US president? Maybe, but is an overreaching (partisan) court worse?." *Presidential Studies Quarterly* 53(2): 234-255.

Canes-Wrone, Brandice. 2023. "Bureaucratic decisions and the composition of the lower courts." *American Journal of Political Science* 47(2): 205-214.

Choi, Matthew. 2023. “Biden to nominate Texas judge to be first Latina on federal appeals court.” April 14, 2023. *The Texas Tribune*, https://www.texastribune.org/2023/04/14/irma-ramirez-judge-nomination-5th-circuit/

Choi, Stephen J., Mitu Gulati, and Eric A. Posner. 2023."Trump's Lower-Court Judges and Religion: An Initial Appraisal." *Virginia Public Law and Legal Theory Research Paper* 2023-49

Clouser McCann, Pamela J., Charles R. Shipan, and Yuhua Wang.2023 "Measuring the Legislative Design of Judicial Review of Agency Actions." *The Journal of Law, Economics, and Organization* 399(1): 123-159.

Crenshaw, Kimberle. 1989. “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics.” *University of Chicago Legal Forum*, Vol. 1989: Iss.1, Article 8.

Cummings, William. 2020. “Civil Rights Leaders to Discuss appointees with Biden; Biden picks for DOD, Justice expected this week.” December 7, 2020. *USA Today*. https://www.usatoday.com/story/news/politics/2020/12/07/politics-updates-joe-biden-donald-trump-presidential-transition/3854979001/

Davis, Susan. 2017. “Senate Pulls ‘Nuclear’ Trigger to Ease Gorsuch Confirmation.” April 6, 2017. NPR. https://www.npr.org/2017/04/06/522847700/senate-pulls-nuclear-trigger-to-ease-gorsuch-confirmation

Devins, Neal, and Lawrence Baum. "Split definitive: How party polarization turned the Supreme Court into a partisan court." *The Supreme Court Review* 2016, no. 1 (2017): 301-365.

Diamond, Jeremy. 2016. “Trump unveils his potential Supreme Court nominees.” May 18, 2016. CNN.com, https://www.cnn.com/2016/05/18/politics/donald-trump-supreme-court-nominees/index.html

Dwidar, Maraam A.2022. "Diverse lobbying coalitions and influence in notice-and-comment rulemaking." *Policy Studies Journal* 50 (1): 199-240.

Epstein, Lee, and Eric A. Posner. 2018. "The decline of Supreme Court deference to the president." *University of Pennsylvania Law Review*: 829-860.

Galanter, Marc. 1974. "Why the haves come out ahead: Speculations on the limits of legal change." *Law & Soc'y Rev.* 9: 95.

Gramlich, John. 2021. How Trump compares with other recent presidents in appointing federal judges. January 13, 2021. Pew Research Center. https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/

Green, Craig. 2021."Deconstructing the administrative state: Chevron debates and the transformation of constitutional politics." *BUL Rev.* 101: 619.

Haire, Susan B., and Laura P. Moyer. 2015. *Diversity matters: Judicial policy making in the US*

courts of appeals. University of Virginia Press

Helmke, Gretchen, and Jeffrey K. Staton. 2011. "The Puzzling Judicial Politics of Latin America." Courts in Latin America, eds Gretchen Helmke and Julio Rios-Figueroa, 306–31, Cambridge, UK: Cambridge University Press.

Headly, Tiana. 2024. "Biden Gets New Fourth Circuit Vacancy as Wynn Plans to Retire." January 9, 2024. *Bloomberg Law*, https://news.bloomberglaw.com/us-law-week/biden-gets-new-fourth-circuit-vacancy-as-wynn-plans-to-retire

Hickey, Jennifer, Gbemende E. Johnson, and Jaylin Small. "Delegation and deference: federal judicial decision-making and administrative agencies." In *Research Handbook on Judicial Politics*, pp. 185-200. Edward Elgar Publishing, 2024.

Hofer, Scott, and Susan Achury. 2021."The Consequences of Diversifying the US District Courts: Race, Gender, and Ideological Alignment through Judicial Appointments." *Justice System Journal* 42, no. 3-4 (2021): 306-324.

Hübert, Ryan, and Ryan Copus. 2022. "Political appointments and outcomes in federal district courts." *The Journal of Politics* 84, no. 2 (2022): 908-922.

Hollis-Brusky, Amanda, and Celia Parry. 2021, "'In the Mold of Justice Scalia": The Contours & Consequences of the Trump Judiciary." *The Forum* 19 (1) pp. 117-142.

Hollis-Brusky, Amanda. *Ideas with consequences: The federalist society and the conservative counterrevolution*. Oxford University Press, USA, 2015.

Jackson, Ashton. 2022. "Biden pledged to nominate a Black woman to the Supreme Court—meet 5 who could be up for the job." *CNBC.com*. https://www.cnbc.com/2022/01/26/biden-pledged-to-nominate-a-black-woman-to-scotus5-who-could-be-up-for-the-job.html

Jacobi, Tonja. "The judicial signaling game: How judges shape their dockets." *Supreme Court Economic Review* 16, no. 1 (2008): 1-38.

Johnson, Gbemende. 2021."Gender, Diversity, and the United States Judiciary." *SAIS Review of International Affairs* 41(1): 61-71.

Kreit, Alex. 2009."Making Sense of Facial and As-Applied Challenges." *Wm. & Mary Bill Rts.*

J. 18: 657.

Lewis, David E., and Mark D. Richardson. 2021 "The very best people: President Trump and the management of executive personnel." *Presidential Studies Quarterly* 51 (1): 51-70.

Manning, Kenneth L., Robert A. Carp, and Lisa M. Holmes. "The Decision-Making Ideology of Federal Judges Appointed by President Trump."2020. *Judicial Process in America (12th ed, Forthcoming), UMass Dartmouth Working Paper*.

Means, Taneisha N. 2023. "Her Honor: Black Women Judges' Experiences with Disrespect and Recusal Requests in the American Judiciary." In *Women of Color Political Elites in the US*, pp. 48-65. Routledge.

Means, Taneisha N. 2019. "Race, Gender, and the Battle to Seat Constance Baker Motley, the First Black Woman Appointed to the Federal Bench," in *Race, Gender, Sexuality, and the Politics of the American Judiciary*, eds. Samantha L. Hernandez and Sharon A. Navarro (Cambridge University Press: Cambridge, UK, 2019): 98-120.

Moe, Terry M. 2012. "Delegation, control, and the study of public bureaucracy." *The Forum*, vol. 10 (2)

McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast.1987. "Administrative procedures as instruments of political control." *The Journal of Law, Economics, and Organization* 3 (2): 243-277.

McCubbins, Mathew D., and Thomas Schwartz.1984. "Congressional oversight overlooked: Police patrols versus fire alarms." *American journal of political science*: 165-179.

Melaku, Tsedale M.2019. *You don't look like a lawyer: Black women and systemic gendered racism*. Rowman & Littlefield.

Moyer, Laura, Allison P. Harris, and Rorie Spill Solberg.2022. "“Better Too Much Than Not Enough”: The Nomination of Women of Color to the Federal Bench." *Journal of Women, Politics & Policy* 43, no. 3 (2022): 363-375.

Pitkin, Hanna Fenichel. 1967. *The Concept of Representation*. University of California Press.

Pittman, Ashton. 2023. “Sen. Cindy Hyde-Smith Blocks Biden Judge Pick for Mississippi Over Trans Rights, Soros PAC.” April 6, 2023. *Mississippi Free Press*,

https://www.mississippifreepress.org/sen-cindy-hyde-smith-blocks-biden-judge-pick-for-mississippi-over-trans-rights-soros-pac/

Primo, David M., Sarah A. Binder, and Forrest Maltzman. "Who consents? Competing pivots in federal judicial selection." *American Journal of Political Science* 52, no. 3 (2008): 471-489.

O'Harrow, Robert and Shawn Boburg. 2019. "A conservative activist's behind-the-scenes campaign to remake the nation's courts." May 21, 2019. *The Washington Post*, https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/

Raymond, Nate. 2023. "Biden nominates five judges in Republican-led states." November 1, 2023.*Rueters*, https://www.reuters.com/legal/government/biden-nominates-five-judges-republican-led-states-2023-11-01/

Raymond, Nate, 2022. "U.S. Senate confirms first Black woman to conservative-leaning 5th Circuit." December 13, 2022. https://www.reuters.com/legal/government/us-senate-confirms-first-black-woman-conservative-leaning-5th-circuit-2022-12-13/

Reddick, Malia, Michael J. Nelson, & Rachel Paine Caufield. 2009. "Election vs. Selection: Racial and Gender Diversity on State Courts," *A.B.A. JUDGES J.* 40, no.3

Resh, William G. 2015 *Rethinking the administrative presidency: Trust, intellectual capital, and appointee-careerist relations in the George W. Bush administration*. JHU Press

Rice, Douglas.2020 *Lighting the Way: Federal Courts, Civil Rights, and Public Policy*. University of Virginia Press

Rice, Douglas. 2014 "The impact of Supreme Court activity on the judicial agenda." *Law & Society Review* 48 (1): 63-90.

Scherer, Nancy. 2023. *Diversifying the courts: Race, gender, and judicial legitimacy*. NYU Press,

Scherer, Nancy, and Brett Curry.2010. "Does descriptive race representation enhance institutional legitimacy? The case of the US courts." *The Journal of Politics* 72(1): 90-104.

Sherman, Mark, Kebin Freking, and Matthew Daly. 2020. Trump's court appointments will leave decades-long imprint. Associated Press. December 26, 2020.

https://apnews.com/article/joe-biden-donald-trump-judiciary-coronavirus-pandemic-us-supreme-court-c37607c9987888058d3d0650eea125cd

Smith, Joseph L. 2007. "Presidents, justices, and deference to administrative action." *The Journal of Law, Economics, & Organization* 23 (2): 346-364.

Songer, Donald R., Jeffrey A. Segal, and Charles M. Cameron. "The hierarchy of justice: Testing a principal-agent model of Supreme Court-circuit court interactions." *American Journal of Political Science* (1994): 673-696.

SoRelle, Mallory E., and Serena Laws. 2024. "Blame, Policy Feedback, and the Politics of Student Debt Relief Policy." In *The Forum*, vol. 22, no. 1, pp. 47-69.

Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the attitudinal model revisited*. Cambridge University Press

Spriggs, James F., and Thomas G. Hansford. 2001. "Explaining the overruling of US Supreme Court precedent." *The Journal of Politics* 63(4): 1091-1111.

Spriggs, James F. 1997. "Explaining federal bureaucratic compliance with Supreme Court opinions." *Political Research Quarterly* 50(3) 567-593.

Steigerwalt, Amy. 2010. *Battle over the bench: Senators, interest groups, and lower court confirmations*. University of Virginia Press.

Stout, Christopher T., Katherine Tate, and Meghan Wilson. 2021. "Does Black representation matter? A review of descriptive representation for African Americans in legislative offices." *National Review of Black Politics* 2(1): 2-21.

Thrower, Sharece. 2017a. "To revoke or not revoke? The political determinants of executive order longevity." *American Journal of Political Science* 61(3): 642-656.

Thrower, Sharece. 2017b."The president, the court, and policy implementation." *Presidential Studies Quarterly* 47(1): 122-145.

Thomsen, Jacqueline. 2023. “Groups urge end to 'blue slip' tradition as judicial nominations slow.” May 4, 2023. https://www.reuters.com/legal/government/groups-urge-end-blue-slip-tradition-judicial-nominations-slow-2023-05-04/

Thurston, Jennifer L. 2019. “Black robes, white judges: The lack of diversity on the magistrate

judge bench.” Law & Contemp Probs.

Tobias, Carl. 2024."Filling the Red State Federal Judicial Vacancies." *Texas A&M Law Review* 12(1): 1-19

Totenberg, Nina. 2021. Biden's Supreme Court commission steers clear of controversial issues in draft report. December 6, 20201. *NPR.* https://www.npr.org/2021/12/06/1061959400/bidens-supreme-court-commission-releases-draft-report

Turner, Cory. 2021. “Biden pledged to forgive $10,000 in student loan debt. Here’s what he’s done so far.” December 7, 2021. NPR. https://www.npr.org/2021/12/07/1062070001/student-loan-forgiveness-debt-president-biden-campaign-promise

Yates, Jeff. 2012.*Popular justice: Presidential prestige and executive success in the Supreme Court*. State University of New York Press.

Vance, Taylor. 2023. Despite bipartisan support, Scott Colom’s federal judicial nomination still stalled in Senate. *Mississippi Today*. https://mississippitoday.org/2023/12/05/scott-colom-judicial-nomination-biden/.

Wheeler, Russell. 2024. “Can Biden top Trump’s number of judicial appointments.” July 23, 2024. *Brookings*, https://www.brookings.edu/articles/can-biden-top-trumps-number-of-judicial-appointments/.

Zink, James R., James F. Spriggs, and John T. Scott. 2009."Courting the public: The influence of decision attributes on individuals’ views of court opinions." *The Journal of Politics* 71(3): 909-925.

		Supreme Court Case Appendix	
Case Citation	**Term**	**Case Title**	**Date Argued**
141 S. Ct. 1669	2020	*GARLAND v. MING DAI*	2/23/2021
141 S. Ct. 1970	2020	*UNITED STATES v. ARTHREX INC.*	3/1/2021
141 S. Ct. 1352	2020	*CARR v. SAUL, COMMISSIONER OF SOCIAL SECURITY*	3/3/2021
141 S. Ct. 1809	2020	*SANCHEZ v. MAYORKAS*	4/19/2021
141 S. Ct. 2434	2020	*YELLEN v. CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION*	4/19/2021
141 S. Ct. 1608	2020	*GUAM v. UNITED STATES*	4/26/2021
142 S. Ct. 959	2021	*UNITED STATES v. ZUBAYDAH*	10/6/2021
142 S. Ct. 641	2021	*BABCOCK v. KIJAKAZI*	10/13/2021
142 S. Ct. 1051	2021	*FEDERAL BUREAU OF INVESTIGATION v. FAZAGA*	11/8/2021
142 S. Ct. 2354	2021	*BECERRA v. EMPIRE HEALTH FOUNDATION*	11/29/2021
142 S. Ct. 1896	2021	*AMERICAN HOSPITAL ASSOCIATION v. BECERRA*	11/30/2021
142 S. Ct. 1614	2021	*PATEL v. GARLAND*	12/6/2021
142 S. Ct. 647	2021	*BIDEN v. MISSOURI*	1/7/2022
142 S. Ct. 661	2021	*NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION*	1/7/2022
142 S. Ct. 1827	2021	*JOHNSON v. ARTEAGA-MARTINEZ*	1/11/2022
142 S. Ct. 2057	2021	*GARLAND v. GONZALEZ*	1/11/2022
142 S. Ct. 1493	2021	*BOECHLER, P.C. v. COMMISSIONER OF INTERNAL REVENUE*	1/12/2022
142 S. Ct. 1638	2021	*FEDERAL ELECTION COMMISSION v. TED CRUZ FOR SENATE*	1/19/2022
142 S. Ct. 2587	2021	*WEST VIRGINIA v. ENVIRONMENTAL PROTECTION AGENCY*	2/28/2022
	2021	*GEORGE v. MCDONOUGH*	4/19/2022
142 S. Ct. 2528	2021	*BIDEN v. TEXAS*	4/26/2022
143 S. Ct. 1322	2022	*SACKETT v. ENVIRONMENTAL PROTECTION AGENCY*	10/3/2022
143 S. Ct. 543	2022	*ARELLANO v. MCDONOUGH*	10/4/2022
143 S. Ct. 713	2022	*BITTNER v. UNITED STATES*	11/2/2022
143 S. Ct. 890	2022	*AXON ENTERPRISE v. FEDERAL TRADE COMMISSION*	11/7/2022
143 S. Ct. 1609	2022	*HAALAND v. BRACKEEN*	11/9/2022
143 S. Ct. 1964	2022	*UNITED STATES v. TEXAS*	11/29/2022
143 S. Ct. 1193	2022	*OHIO ADJUTANT GENERALâ™S DEPARTMENT v. FEDERAL LABOR RELATIONS AUTHORITY*	1/9/2023
143 S. Ct. 1103	2022	*SANTOS-ZACARIA v. GARLAND*	1/17/2023
143 S. Ct. 2343	2022	*DEPARTMENT OF EDUCATION v. BROWN*	2/28/2023

143 S. Ct. 2355	2022	*BIDEN v. NEBRASKA*	2/28/2023
143 S. Ct. 1804	2022	*ARIZONA v. NAVAJO NATION*	3/20/2023
143 S. Ct. 1231	2022	*POLSELLI v. INTERNAL REVENUE SERVICE*	3/29/2023
143 S. Ct. 1833	2022	*PUGIN v. GARLAND*	4/17/2023
143 S. Ct. 2279	2022	*GROFF v. DEJOY*	4/18/2023
144 S. Ct. 1474	2023	*CONSUMER FINANCIAL PROTECTION BUREAU v. COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LIMITED*	10/3/2023
144 S. Ct. 1507	2023	*VIDAL v. ELSTER*	11/1/2023
144 S. Ct. 457	2023	*DEPARTMENT OF AGRICULTURE RURAL DEVELOPMENT RURAL HOUSING SERVICE v. KIRTZ*	11/6/2023
144 S. Ct. 945	2023	*RUDISILL v. MCDONOUGH*	11/8/2023
144 S. Ct. 780	2023	*WILKINSON v. GARLAND*	11/28/2023
144 S. Ct. 2117	2023	*SECURITIES AND EXCHANGE COMMISSION v. JARKESY*	11/29/2023
144 S. Ct. 2071	2023	*HARRINGTON v. PURDUE PHARMA L.P.*	12/4/2023
144 S. Ct. 1637	2023	*CAMPOS-CHAVES v. GARLAND*	1/8/2024
144 S. Ct. 771	2023	*FEDERAL BUREAU OF INVESTIGATION v. FIKRE*	1/8/2024
144 S. Ct. 1588	2023	*OFFICE OF THE U.S. TRUSTEE v. JOHN Q. HAMMONS FALL 2006, LLC*	1/9/2024
144 S. Ct. 2244	2023	*LOPER BRIGHT ENTERPRISES v. RAIMONDO*	1/17/2024
144 S. Ct. 2440	2023	*CORNER POST v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM*	2/20/2024
144 S. Ct. 2040	2023	*OHIO v. ENVIRONMENTAL PROTECTION AGENCY*	2/21/2024
144 S. Ct. 1613	2023	*GARLAND v. CARGILL*	2/28/2024
144 S. Ct. 1972	2023	*MURTHY v. MISSOURI*	3/18/2024
144 S. Ct. 1178	2023	*HARROW v. DEPARTMENT OF DEFENSE*	3/25/2024
144 S. Ct. 1428	2023	*BECERRA v. SAN CARLOS APACHE TRIBE*	3/25/2024
144 S. Ct. 1540	2023	*FOOD AND DRUG ADMINISTRATION v. ALLIANCE FOR HIPPOCRATIC MEDICINE*	3/26/2024
144 S. Ct. 1406	2023	*CONNELLY v. UNITED STATES*	3/27/2024
144 S. Ct. 1812	2023	*DEPARTMENT OF STATE v. MUÃ±OZ*	4/23/2024
144 S. Ct. 1570	2023	*STARBUCKS CORP. v. MCKINNEY*	4/23/2024