New Retirements Give Biden Opportunity to Make First Circuit All Democratic Appointees

This week's judicial vacancy news cycle was understandably focused on Justice Breyer's announcement that he would be retiring from the Supreme Court upon confirmation of his successor. And equally (if not more) importantly, President Biden confirmed that he would be keeping his campaign promise to nominate the first black woman to the nation's highest court. But beyond this first Supreme Court nomination for President Biden, his administration has already had a significant impact in nominating lower court judges to district and circuit courts. And in some federal courts, like the First Circuit, this pace of nominations is going to have an outsized effect.

In his first year in office, President Biden has nominated 81 federal judges, 42 of which have already been confirmed. This is the most judicial confirmations in a president's first year since before Ronald Reagan. Some of these confirmations will provide a counterbalance to the significant number of confirmations during the Trump administration, which had enormous ideological shifting effects on traditionally "liberal" courts like the Ninth Circuit.

But in other courts, Biden's appointments will solidify control by Democratic appointees for the foreseeable future. In the U.S. Court of Appeals for the First Circuit, where I had the honor of clerking for Judge O. Rogeriee Thompson, there are six active judicial seats, along with three current senior judges. Biden had already confirmed one judge—Gustavo A. Gelpí—after his predecessor Judge Juan Torruella passed away in October 2020. Then in July 2021, Judge Thompson announced that she would be taking senior status upon appointment of a successor. A successor nominee has not yet been announced for Judge Thompson's seat.

Then, just last week in the shadow of Justice Breyer's announcement, we heard the news that may cause the First Circuit to become a complete lock for Democratic appointees. Chief Judge Jeffrey Howard, the court's lone Republican appointee, announced he would be taking senior status upon confirmation of a successor.

Once Chief Judge Howard's successor is confirmed—presumably before November of this year—the First Circuit will be occupied by exclusively Democratic appointees. Most of the judges will be quite young. Judge Gelpí and Judge Barron are 56 and 54, respectively. Chief Judge Howard and Judge Thompson's successors will presumably be a similar age, and maybe even younger. The two oldest active judges on the court will be Judge Kayatta—68—and Judge Lynch—75.

With a 6-3 conservative supermajority on the Supreme Court (in the more divisive cases), there may be a growing collision course with a universally Democrat-appointed and reasonably young First Circuit judiciary. In recent years the First Circuit has been the source of a number of important cases relating to criminal justice reform, the death penalty, free speech, extension of rights/benefits to Puerto Rico, immigrant civil rights, and consumer rights. Although all judges are different, and appointment by a Democrat does not imply a partisan result, the influx of new judges will likely continue—and even supercharge—this dynamic.