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BIDEN’S PROSECUTORS

*Melanie D. Wilson**

INTRODUCTION

In President Biden’s inauguration speech, he offered us hope, while acknowledging America’s challenging history.¹ He also promised progress—real progress—on racial justice. “A cry for racial justice some 400 years in the making moves us. The dream of justice for all will be deferred no longer[.]”² he said.

Meaningful progress toward racial equality begins with a fairer criminal justice system. We must take an anti-racist, anti-xenophobic, anti-homophobic, and anti-classist approach to prosecutions. In turn, that type of progress demands sound leadership at the Department of Justice (DOJ) and from the ninety-three United States attorneys whom the President appoints.³ The lead prosecutors in the federal system must act with integrity, courage, and independence. They should also reflect the rich diversity of the people in our country. Representation matters, and diverse groups make better decisions. This essay focuses on President Biden’s strides in that direction during his first 100 days.

I. BIDEN’S PICKS TO LEAD THE DOJ AND TO SERVE AS UNITED STATES ATTORNEYS

It is too early to predict whether Biden’s lead federal prosecutors will better reflect the diversity in America and whether they will restore integrity, independence, and an adherence to the rule of law to the job. But, Biden’s initial appointments are promising.

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1. President Biden began his speech: “This is America’s day. This is democracy’s day. A day of history and hope. Of renewal and resolve.” Joseph R. Biden, President, U.S., Inaugural Address (Jan. 20, 2021). President Biden continued: “We look ahead in our uniquely American way – restless, bold, optimistic – and set our sights on the nation we know we can be and we must be.” *Id.*

2. *Id.*

3. On January 7, 2021—the day after the insurrection at the U.S. Capitol—President Biden noted the need for fairness, impartiality, honor, and integrity in the related context of judicial appointments. *See* Joseph R. Biden, President-Elect, U.S., Speech on Upcoming Appointments to the Federal Courts and Department of Justice (Jan. 7, 2021). President Biden also praised the role state and federal judges played in rejecting Donald Trump’s legal challenges to the November 4, 2020 election.

A. *Biden's DOJ Leadership*

The day after the riot at the U.S. Capitol, then President-elect Biden announced his selection for U.S. Attorney General and other key positions within the DOJ. Immediately before naming the proposed leadership team, Biden emphasized DOJ's origins and connected it to the fight against racism and domestic terrorism. He explained: "[The DOJ] was formed in 1870 to enforce the civil rights amendment[s] that grew out of the Civil War. The 13th, 14th, and 15th amendments. To stand up to the Klan, to stand up to racism, to take on domestic terrorism."⁴ With this nod to the DOJ's role in pursuing racial justice, Biden declared that the DOJ will look and act very differently than it had during the prior four years. But Biden did not stop there. He emphasized that the DOJ would regain its independence: "You won't work for me. You are not the [P]resident or the [V]ice [P]resident's lawyer. Your loyalty is not to me. It's to the law, the Constitution, the people of this nation, to guarantee justice."⁵ And, he derided the former president's "contempt for our democracy, our [C]onstitution, [and] the rule of law."⁶

With that backdrop, President Biden announced Judge Merrick Garland,⁷ as his nominee for Attorney General, describing him as "a man of impeccable integrity" who is "[f]ull of character and decency."⁸ He followed that announcement with three historic nominations—all women, including two women of color, to fill other top DOJ posts. Biden chose long-time DOJ attorney Lisa Monaco for Deputy Attorney General (the second-in-command), Vanita Gupta, as Associate Attorney General (the number three DOJ position), and Kristen Clarke, to lead the Civil Rights Division.⁹ Gupta is the first woman of color to serve in the number three role,¹⁰ and, if confirmed, Clarke will be the first Black woman to lead the Civil Rights Division.¹¹

With these selections, President Biden has established a different tenor. While all enjoy extensive DOJ experience, Biden's nominees are an otherwise eclectic group, especially when compared to the DOJ leadership under his predecessor, which was dominated by white men and people willing to bend to politics.

4. *Id.*

5. *Id.*

6. *Id.*

7. At the time of his nomination, Judge Garland served on the U.S. Court of Appeals for the District of Columbia Circuit. *See id.*

8. *Id.*

9. *Id.*

10. *Joe Biden Praises Gupta, Says She Is 'Proud Daughter' of Immigrants from India*, ECON. TIMES (Jan. 8, 2021, 11:22 AM), <https://economictimes.indiatimes.com/nri/migrate/joe-biden-praises-vanita-gupta-says-she-is-proud-daughter-of-immigrants-from-india/articleshow/80165981.cms?from=mdr> [<https://perma.cc/WP62-B5CY>].

11. *See* Averi Harper, *DOJ Nominee Kristen Clarke Wants to Make the Promise of "Justice for All" a Reality*, ABCNEWS.COM (Jan. 26, 2021, 9:20 AM), <https://abcnews.go.com/Politics/doj-nominee-kristen-clarke-make-promise-justice-reality/story?id=75476613> [<https://perma.cc/F27L-W6ZD>].

Because women and minorities often face resistance in the confirmation process, many wondered whether Biden would succeed in getting this diverse DOJ leadership group confirmed. And, what about his selection of U.S. Attorneys; will Biden continue to foster the ideals of independence, antiracism, adherence to the rule of law, and integrity with those appointments?

B. *Biden's Successful Confirmations*

Biden's selections—even the more controversial ones—are destined for Senate confirmation. On March 10, the Senate confirmed Merrick Garland as Attorney General in a 70–30 vote.¹² Two weeks later, Republicans and Democrats on the Senate Judiciary Committee voted to forward Lisa Monaco's nomination to the Senate¹³—where on April 20, she received “strong bipartisan support” in a 98–2 confirmation vote.¹⁴

Vanita Gupta and Kristen Clarke—the two women of color—are a different story. They have faced significant Republican opposition. Gupta's committee vote split evenly along party lines, giving her just enough votes to trigger a full Senate vote.¹⁵ The Senate later confirmed Gupta 51–49 with only one Republican vote in support.¹⁶ Kristen Clarke was the last of the four to receive a hearing before the Senate Judiciary Committee,¹⁷ signaling that her confirmation will be the toughest and most controversial yet. But, with Democrats holding a slim majority in the Senate, Clarke's chances of confirmation remain good. In other words, despite some fierce Republican opposition, President Biden has already paved a successful path to a more diverse DOJ leadership team.

Will the U.S. attorneys appointed by the President follow the same pattern?

12. Alex Rogers, *Senate Confirms Merrick Garland as Attorney General*, CNN (Mar. 10, 2021), <https://www.cnn.com/2021/03/10/politics/garland-senate-confirmation-vote/index.html> [

13. Katie Benner, *Senate Panel Deadlocks over the Nomination of Vanita Gupta to a High-Ranking Justice Department Post*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/us/vanita-gupta-justice-senate.html> [<https://perma.cc/3V2M-KYKM>].

14. Chris Strohm, *Biden Pick Lisa Monaco Wins Senate Confirmation for No. 2 at DOJ*, BLOOMBERG (Apr. 20, 2021), <https://www.bloomberg.com/news/articles/2021-04-20/biden-pick-lisa-monaco-wins-senate-confirmation-for-no-2-at-doj> [<https://perma.cc/J997-EHHJ>].

15. See Sarah N. Lynch, *In Partisan Divide, Senate Judiciary Committee Splits on Justice Department Nominee Gupta*, U.S. NEWS (Mar. 25, 2021), <https://www.usnews.com/news/top-news/articles/2021-03-25/us-senate-panel-to-vote-on-justice-dept-nominees-gupta-monaco>.

16. Jason Breslow, *Civil Rights Attorney Vanita Gupta Confirmed as Associate Attorney General*, NPR (Apr. 21, 2021, 6:29 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/21/989599055/civil-rights-attorney-vanita-gupta-confirmed-as-associate-attorney-general> [<https://perma.cc/CSJ5-TZ5W>].

17. See Christina Carrega, *DOJ Nominee Kristen Clarke Faces Senate as Supporters Say Civil Rights Chief Is Badly Needed*, CNN (Apr. 14, 2021), <https://www.cnn.com/2021/04/14/politics/kristen-clarke-justice-department-nomination/index.html> [<https://perma.cc/RFS6-F3AG>]; Andrew Feinberg, *Does Biden's Justice Department Even Have Any Power?*, INDEP. (Mar. 30, 2021, 6:47 PM), <https://www.independent.co.uk/voices/biden-justice-department-kristen-clarke-mitch-mcconnell-b1824593.html> [<https://perma.cc/8LQK-VHJR>].

C. *Biden's U.S. Attorneys*

By nominating Garland, Monaco, Gupta, and Clarke, Biden signaled his commitment to inclusivity, experience, integrity, and independence, which suggests that his U.S. attorney appointments will probably also look different from those of his predecessor.

When Biden was elected, 85% (79 out of 93) of U.S. attorneys were white men.¹⁸ As of October, 2020, only nine U.S. attorneys were women, and there were only two Black and two Hispanic U.S. attorneys in the nation.¹⁹ The Trump presidency exacerbated the homogeneity among the chief federal prosecutors across the country. But even before Trump's presidency, diversity within the ranks of federal prosecutors was scarce. For example, in 2015, only 8% of assistant U.S. attorneys were Black and only 5% were Latino.²⁰

Early signs suggest that President Biden intends to make good on his inauguration-day promises by appointing a more diverse group of prosecutors and by advancing other goals key to a more equitable criminal (and racial) justice system. As is customary, the Biden administration has started removing Trump-appointed U.S. attorneys, and in record time.²¹ There are also indicators that the President's U.S. attorneys will better reflect the rich diversity within the United States. Among his anticipated nominees are Damian Williams, who would be the first Black man to serve as the head prosecutor in the Southern District of New York, and Trini Ross, who would be the first Black woman to serve as U.S. Attorney for the Western District of New York.²²

In a country struggling to reconcile justice with racism and to balance crime reduction against overcriminalization, building a diverse leadership team of federal prosecutors—steeped in integrity and experience—is a strong start.

18. Jake Bleiberg et al., *Trump's Top Federal Prosecutors are Overwhelmingly White Men*, ASSOCIATED PRESS (Oct. 6, 2020), <https://apnews.com/article/race-and-ethnicity-donald-trump-shootings-racial-injustice-george-w-bush-f6995edcc2158df1f8b0cb4f9574bdaf> [<https://perma.cc/W7GZ-HL7J>] (noting that “nearly three decades” of data revealed “a persistent lack of diversity in the ranks of U.S. attorneys” reaching “a nadir in the Trump administration”).

19. *Id.*

20. See Raman Preet Kaur, *When It Comes to U.S. Attorneys, All Americans Need a Seat at the Table*, CTR. FOR AM. PROGRESS (June 22, 2017, 9:02 AM), <https://www.americanprogress.org/issues/courts/news/2017/06/22/434808/comes-u-s-attorneys-americans-need-seat-table/> [<https://perma.cc/8CAR-VCSM>].

21. See Tal Axelrod, *Biden's DOJ Begins Replacing Trump-Appointed U.S. Attorneys*, THE HILL (Feb. 9, 2021, 6:29 PM), <https://thehill.com/homenews/administration/538091-doj-begins-process-of-replacing-us-attorneys> [<https://perma.cc/4VBZ-TK6H>] (noting that “[w]hile the replacement of attorneys from prior administrations is common, Biden's rollout is more abrupt than in past White Houses” which typically asked for resignations “over a broader period of time”).

22. See *Biden to Nominate 3 Prosecutors to Head U.S. Attorneys' Offices in New York*, NBCNEWS (Mar. 24, 2021), <https://www.nbcnews.com/politics/justice-department/biden-nominate-3-prosecutors-head-u-s-attorneys-offices-new-n1261910> [<https://perma.cc/KM8L-TJXN>].

CONCLUSION

In his inauguration speech, President Biden set a hopeful tone, while acknowledging the work remaining for our country. Some of that work rests with our federal justice system. Biden's early DOJ nominations prove that he values experience, integrity, diversity, independence, and adherence to the rule of law—all traits that will help improve our system. And, that should give us all hope.