

NOTES

How Compassionate?: Political Appointments & District Court Judge Responses to Compassionate Release During COVID-19

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The Trump Administration sought to transform the judiciary by appointing numerous conservative judges to the bench, building on a Republican project that is decades in the making. This Note examines how judges are deciding compassionate release motions in the wake of the COVID-19 pandemic, which has proven particularly deadly inside the nation's prisons. This Note explores how judges appointed by Republicans and Democrats have ruled in more than 6,000 federal compassionate release cases in the first ten months of the pandemic, finding that judges appointed by Democrats are granting compassionate release at far higher rates than their Republican counterparts, with Trump judges granting among the fewest requests. The First Step Act of 2018 gave incarcerated individuals the right to file a motion for early release in court in light of "extraordinary and compelling" circumstances, and requests for release have skyrocketed since the outbreak of the virus. The unique conditions of the pandemic, high levels of virus transmission in prisons, and the highly discretionary nature of the compassionate release statute together offer a natural experiment for considering how judicial ideology impacts people's lives. The results of this analysis underscore the importance of the fight over control of the judiciary going forward.

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INTRODUCTION

In fall 2020, as the global pandemic raged, Senate Republicans rushed through the confirmation of Justice Amy Coney Barrett to the Supreme Court. The move incensed Democrats, coming just weeks ahead of a pivotal presidential election in which early voting had already begun.¹ Although President Trump would go on to lose the 2020 race, he, along with his Senate allies, have now won a 6–3 majority on the High Court—making it the most conservative Court in generations.² Over Trump’s tenure, Republican leaders named a total of 234 Article III judges to the federal bench—only Democratic President Jimmy Carter had appointed more judges by the fourth year of his presidency.³

None of this is happenstance. There is an oft-repeated phrase in Washington that “personnel is policy,”⁴ and that sentiment increasingly extends to the bench.

1. Grace Segers, *Amy Coney Barrett Sworn in as Newest Supreme Court Justice*, CBS NEWS (Oct. 27, 2020, 11:18 AM), <https://www.cbsnews.com/news/amy-coney-barrett-supreme-court-justice-sworn-in/> [<https://perma.cc/PEY7-MM5R>]. The move also came despite Republicans’ refusal to take up Merrick Garland’s nomination to the Supreme Court in spring 2016 because it would occur during an election year—albeit months before voting would begin. See Emma Green, *How the Senate Stopped Pretending: Senators Grapple with the Reality That They Have Destroyed Their Own House*, ATLANTIC (Oct. 15, 2020), <https://www.theatlantic.com/politics/archive/2020/10/amy-coney-barrett-senate-hearing-fail/616744/>.

2. See Joan Biskupic, *The Supreme Court Hasn’t Been This Conservative Since the 1930s*, CNN (Sept. 26, 2020, 6:33 PM), <https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html> [<https://perma.cc/K6F8-ENAW>].

3. Kate Carsella, *U.S. Senate Returns 37 Federal Judicial Nominations to President*, BALLOTPEdia NEWS (Jan. 8, 2021, 4:35 PM), <https://news.ballotpedia.org/2021/01/08/u-s-senate-returns-37-federal-judicial-nominations-to-president/> [<https://perma.cc/4X8D-X6PR>]; Sara Reynolds, *Trump Has Appointed Second-Most Federal Judges Through November 1 of a President’s Fourth Year*, BALLOTPEdia NEWS (Nov. 3, 2020, 11:25 AM), <https://news.ballotpedia.org/2020/11/03/trump-has-appointed-second-most-federal-judges-through-november-1-of-a-presidents-fourth-year/> [<https://perma.cc/W7QD-QNHG>].

4. Jeff Hauser & David Segal, *Personnel Is Policy: The Vital Importance of Appointing People Who Work—and Think—in the Public Interest*, DEMOCRACY (Feb. 6, 2020, 3:43 PM), <https://democracyjournal.org/magazine/personnel-is-policy/> [<https://perma.cc/9ZVT-FBSG>].

As Senate Majority Leader Mitch McConnell told Politico in 2018, “I love the tax bill and a lot of the other things we did. But I think lifetime appointments — not only to the Supreme Court but to the circuit courts — are the way you have the longest lasting impact on the country[]’”⁵

The conservative movement has long sought to pack the courts with like-minded judges—and that effort has not stopped with the higher courts, although those are the venues that commonly receive the most attention. The Trump Administration named 174 judges to the district courts (of the total 234 federal judicial appointments).⁶ Collectively, these judges have the opportunity to significantly alter the legal landscape on a host of important issues that impact American life.

Meanwhile, for more than two years, American life has been dominated by the COVID-19 crisis. Tens of millions have been sickened and more than 982,000 (and counting) have died as of spring 2022.⁷ Millions have lost their jobs while others, especially those in service industries, have been forced to work under the threat of catching a potentially deadly virus. Millions more have faced eviction or bankruptcy. Education at all levels has been disrupted. The elderly and those with compromised immune systems have been forced into long-term isolation, while parents are expected to juggle work demands and round-the-clock childcare simultaneously. Indeed, the pandemic has impacted almost every facet of day-to-day living.

This Note considers the ongoing crisis through another lens, bringing together the political fight over the judicial system and the effects of COVID-19 on one of the country’s most vulnerable populations: incarcerated individuals. The Note provides a detailed look at how district court judges, including Trump judges,⁸ are ruling in compassionate release cases during the pandemic. The federal compassionate release program, which provides sentence reduction and early release for individuals incarcerated under federal law, has historically been driven by the U.S. Bureau of Prisons (BOP) and has been used only rarely because requests for compassionate release could not be initiated by incarcerated individuals in court.⁹ Legislation enacted at the end of 2018—the First Step Act—gave inmates the right to petition sentencing courts directly for compassionate release, subject to certain conditions discussed in-depth below.¹⁰

5. Burgess Everett & Elana Schor, *McConnell’s Laser Focus on Transforming the Judiciary*, POLITICO (Oct. 17, 2018, 6:30 PM), <https://www.politico.com/story/2018/10/17/senate-gop-judges-911935> [<https://perma.cc/2VCS-HTTV>].

6. Carsella, *supra* note 3.

7. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> (last updated Apr. 8, 2022) [hereinafter *Coronavirus Case Count*].

8. This Note will refer to these judges as Trump-appointed judges or Trump judges and will follow the same convention for judges appointed by other presidents.

9. *See infra* Section II.A.

10. Pub. L. No. 115-391, 132 Stat. 5194; *see infra* Section II.B.

The First Step Act's compassionate release program has taken on new import in light of the pandemic, which has ravaged prisons. The unique circumstances of the coronavirus outbreak, high levels of virus transmission in prisons, and the highly discretionary nature of the compassionate release statute together offer a natural experiment for considering how judicial ideology can affect the law and the lives of real people in profound ways. To conduct that experiment, this Note constructs a dataset of more than 6,000 compassionate release decisions from federal district courts since the start of the pandemic, with each case sorted by presidential appointment. The dataset seeks to include all compassionate release cases from March 2020 to December 2020 found on Westlaw. The aim is to consider how these judges are responding to sick and elderly incarcerated people during this historic crisis—and the role that ideology may play in their decisionmaking.

This Note will proceed in four Parts. Part I reviews the political fight over judicial appointments, including under the Trump Administration, and a lack of diversity on the bench, particularly among conservative appointees. Part II explores the history of compassionate release and the First Step Act and its heightened significance during the COVID-19 pandemic. Part III delves into the data analysis and key findings of this Note: that judges appointed by Democrats are granting compassionate release at far higher rates than their Republican-appointed counterparts. Part IV further considers the life-and-death impact of the judiciary in this arena and early steps the Biden Administration is taking on judicial appointments.

I. MODERN HISTORY OF JUDICIAL APPOINTMENTS

To start, it is worth considering the modern political history of judicial appointments and the current state of the federal bench. In short, the judiciary was far from progressive before Trump's election, with conservatives increasingly focused on reshaping the courts. The Trump Administration, aided by Senate Republicans, expanded upon these efforts to push the courts even further to the right while reversing efforts to diversify the federal bench. This Part will explore the rise of the conservative judicial movement and the lack of diversity on the bench and its significance.

A. BATTLE FOR THE JUDICIARY

The fight for political control of the courts has been a central theme of the Trump Administration, but its beginnings stretch back decades. The Federalist Society, the behind-the-scenes leader of the right's efforts to reshape the federal bench, got its start in the early 1980s.¹¹ The organization is home to some 60,000 conservative and libertarian lawyers, law students,

11. Michael Kruse, *The Weekend at Yale That Changed American Politics*, POLITICO MAG. (Sept.–Oct. 2018), <https://www.politico.com/magazine/story/2018/08/27/federalist-society-yale-history-conservative-law-court-219608> [<https://perma.cc/H6MA-N8X4>].

and scholars across the country.¹² Although the group describes itself as being “about ideas” and focused on “fostering debate and discussion of important legal topics,”¹³ that belies its immense political influence, particularly over judicial nominations.¹⁴ Indeed, the organization plays a central role in selecting conservative judges to be named to the bench, often providing a “short list” of potential candidates to Republican leaders.¹⁵ The Federalist Society is supported by powerful conservative financial interests, including Charles G. Koch, Richard Mellon Scaife’s foundation, and the Mercer family.¹⁶ All six conservative members of the Supreme Court have ties to the group,¹⁷ and the organization played a key role in the George W. Bush and Trump Administrations, guiding those Presidents’ approaches to judicial appointments.¹⁸ The strategy is to remake the courts through like-minded judges, including those who favor an originalist interpretation of the Constitution and limited government.¹⁹

But it would be misleading to attribute the makeup of the courts entirely to these conservative efforts. Part of the story is the lack of similar engagement from the other side of the U.S. political spectrum. Democrats and their allies have historically not had a left-leaning pipeline that is anywhere near as robust as the one on the right, although there are some promising new efforts to address this imbalance, including the creation of new groups on the left championing these issues.²⁰

12. *About Us*, FEDERALIST SOC’Y, <https://fedsoc.org/about-us#FAQ> [<https://perma.cc/W6W6-Z5MZ>] (last visited Apr. 25, 2022).

13. *Id.*

14. See Kruse, *supra* note 11.

15. See Mary Louise Kelly, *What Is the Federalist Society and How Does It Affect Supreme Court Picks?*, NPR (June 28, 2018, 5:44 PM), <https://www.npr.org/2018/06/28/624416666/what-is-the-federalist-society-and-how-does-it-affect-supreme-court-picks> [<https://perma.cc/L9UR-KPGM>].

16. Evan Mandery, *Why There’s No Liberal Federalist Society: The Legal Left Has a Money Problem, a History Problem and—Maybe Worst of All—a Big Idea Problem*, POLITICO MAG. (Jan. 23, 2019), <https://www.politico.com/magazine/story/2019/01/23/why-theres-no-liberal-federalist-society-224033> [<https://perma.cc/RPW8-L4LD>].

17. See Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> (noting the connections between the Federalist Society and Justices Roberts, Alito, Thomas, and Gorsuch); see also Madison Alder & Kimberly Strawbridge Robinson, *Trump Offered Barrett Seat Three Days After Ginsburg Died (1)*, BLOOMBERG L. (Sept. 29, 2020, 7:38 PM), <https://news.bloomberglaw.com/us-law-week/barrett-left-federalist-society-same-year-joined-federal-bench> (noting the connections between the Federalist Society and Justices Kavanaugh and Barrett).

18. See Toobin, *supra* note 17.

19. David Montgomery, *Conquerors of the Courts*, WASH. POST (Jan. 2, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/>; see Eric Lipton & Jeremy W. Peters, *In Gorsuch, Conservative Activist Sees Test Case for Reshaping the Judiciary*, N.Y. TIMES (Mar. 18, 2017), <https://www.nytimes.com/2017/03/18/us/politics/neil-gorsuch-supreme-court-conservatives.html>.

20. The closest analogue is perhaps the center-left American Constitution Society, but its funding and scale pale in comparison to the Federalist Society. See Mandery, *supra* note 16. Several newer and more progressive groups, including Demand Justice and the People’s Parity Project, are adding critical perspective to the debate

These broader tensions over control of the courts, decades in the making, reached new heights during the Obama Administration, setting the stage for Trump to significantly impact the bench. During his first term, Obama was reportedly slow to prioritize judicial nominations and inclined to select moderates less likely to rankle Senate Republicans, who were already seeking the delay of even uncontroversial nominees.²¹ “As a result of this snail’s pace, the federal courts are only a shade less rightwing than when Obama became president in 2009,” said one progressive commentator after Obama’s 2012 reelection.²² Republican obstructionism in Congress added to the challenges, spurring Senate Democrats to use the “nuclear option” in 2013 to eliminate the filibuster on most presidential nominees, thus replacing the sixty-vote threshold with a simple-majority requirement for approval.²³ The situation worsened when Republicans gained control of the Senate in the 2014 midterm elections, slowing judicial confirmations to a crawl.²⁴ As a result, Obama’s judicial confirmation rate for judges was significantly below that of any of his modern predecessors.²⁵ When Obama left office, Trump inherited eighty-eight district court vacancies and seventeen vacancies on the appeals courts²⁶—nearly twice as many as Obama had inherited from his

and may become influential forces on this issue. See Irin Carmon, *Burn It All Down*, N.Y. MAG. (Oct. 22, 2020), <https://nymag.com/intelligencer/2020/10/the-liberal-lawyers-who-want-more-than-court-packing.html>.

21. Charlie Savage, *Obama Lags on Judicial Picks, Limiting His Mark on Courts*, N.Y. TIMES (Aug. 17, 2012), <https://www.nytimes.com/2012/08/18/us/politics/obama-lags-on-filling-seats-in-the-judiciary.html>; Elliot Slotnick, Sara Schiavoni & Sheldon Goldman, *Obama’s Judicial Legacy: The Final Chapter*, 5 J.L. & CTS. 363, 417 (2017) (“President Obama, it would seem, sought to lower the political temperature in the judicial selection and confirmation process. The question is whether by not being aggressive and prioritizing judicial appointments in his public comments and on the campaign trail, the president wound up with less than he otherwise would have.”).

22. Robert Kuttner, *The Courts: How Obama Dropped the Ball*, AM. PROSPECT (Dec. 12, 2012), <https://prospect.org/justice/courts-obama-dropped-ball/> [<https://perma.cc/N7WJ-KSVJ>].

23. Paul Kane, *Reid, Democrats Trigger ‘Nuclear’ Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html. The rule change did not apply to Supreme Court nominees until 2017, when Senate Republicans changed the rule during Justice Neil Gorsuch’s confirmation process. Matt Flegenheimer, *Senate Republicans Deploy ‘Nuclear Option’ to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html>.

24. Patrick Caldwell, *Senate Republicans Are Blocking Obama’s Judges at a Nearly Unprecedented Rate*, MOTHER JONES (Nov. 4, 2015), <https://www.motherjones.com/politics/2015/11/senate-republicans-block-obama-judge-nominations/> [<https://perma.cc/Y5WJ-GE5X>].

25. Slotnick et al., *supra* note 21, at 376 (“When viewed from the perspective of the ‘success rates’ for presidential administrations dating back to Jimmy Carter, that is, the percentage of one’s nominees actually confirmed in a 2-year congressional session, President Obama’s record in the 114th (29.0% district courts, 12.5% courts of appeals) continues to greatly lag behind that of all of his predecessors.”).

26. Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump—What Has He Done with Them?*, BROOKINGS INST. (June 4, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump/> [<https://perma.cc/YBM9-U4SE>]. Those vacancies represent about twelve percent of those judgeships—there were 677 authorized district court judgeships and 179 authorized appeals court seats when Trump took office. *Vacancy Summary for January 2017*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/01/summary> [<https://perma.cc/JN39-SN36>] (last updated Jan. 6, 2017).

predecessor.²⁷ With Trump and fellow Republicans in control of the White House and the Senate, they seized on the opportunity to appoint conservative judges to the federal bench. The proportion of active judges appointed by a Republican rose from 40% when Trump took office to 54% by the end of his term.²⁸

Following the Federalist Society's playbook, Trump and McConnell quickly capitalized on these vacancies, confirming new judges to the bench, including Justice Neil Gorsuch, shortly after Trump's inauguration.²⁹ Over time, Senate Republicans went further, bypassing "blue slips"—a practice that gives home-state senators the opportunity to block a judicial nominee—and changing Senate rules to reduce the length of debate time spent on presidential nominees, including judges.³⁰ Over his single term in office, Trump flipped control of the Supreme Court, now with a six-to-three conservative majority, and appointed 234 judges to the federal bench.³¹

Meanwhile, President Biden has inherited the smallest number of judicial vacancies since George H.W. Bush—just forty-five positions, including two circuit court vacancies and forty-three district court vacancies.³² Additional vacancies have since opened up as judges take senior status—a form of semiretirement that permits Presidents to appoint new active judges to those seats—but many of those retirements have come from judges in blue states, who were appointed by former Democratic Presidents.³³ That means replacing those judges will not shift the overall ideological balance of the courts. Biden had nominated ninety

27. Max Rust, *How Trump Reset the Federal Judiciary: While Most Presidents Have Influenced the Courts, Trump Has Substantially Shifted the Judiciary with Republican Appointees*, WALL ST. J. (Oct. 15, 2020, 2:13 PM), <https://www.wsj.com/articles/how-trump-reset-the-federal-judiciary-11602785250>; see *Judicial Vacancies During the Trump Administration*, BALLOTPEdia, https://ballotpedia.org/Judicial_vacancies_during_the_Trump_administration [https://perma.cc/8PD3-NYVW] (last visited May 25, 2022).

28. Laura Kusisto & Ken Thomas, *Biden Has First Shot at Judicial Vacancies*, WALL ST. J. (Mar. 29, 2021, 6:00 AM), <https://www.wsj.com/articles/biden-has-first-shot-at-judicial-vacancies-11617012000>.

29. See Lipton & Peters, *supra* note 19.

30. Karoun Demirjian, *Grassley Schedules Contentious Judicial Nominees for Hearing*, WASH. POST (Nov. 16, 2017), https://www.washingtonpost.com/powerpost/grassley-schedules-contentious-judicial-nominees-for-hearing/2017/11/16/2e6071fc-cb1c-11e7-8321-481fd63f174d_story.html; Burgess Everett, *Republicans Trigger 'Nuclear Option' to Speed Trump Nominees*, POLITICO (Apr. 3, 2019, 5:52 PM), <https://www.politico.com/story/2019/04/03/senate-republicans-trigger-nuclear-option-to-speed-trump-nominees-1253118> [https://perma.cc/5PSX-7QVS]; see also Carl Tobias, *President Donald Trump's War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531, 534–35 (2019) (“The practices identified might well have substantially reduced the number of accomplished, mainstream, and diverse candidates who received nomination and confirmation.”).

31. Carsella, *supra* note 3; Bob Van Voris, *Biden Agenda Faces GOP Legal Attacks and Skeptical Trump Judges*, BLOOMBERG (Nov. 10, 2020, 2:00 AM), <https://www.bloomberg.com/news/articles/2020-11-10/army-of-trump-judges-will-weigh-legal-challenges-to-biden-agenda>.

32. *Judicial Vacancies During the Biden Administration*, BALLOTPEdia, https://ballotpedia.org/Judicial_vacancies_during_the_Biden_administration#Vacancies_at_the_start_of_term [https://perma.cc/ES43-KUR3] (last visited Apr. 26, 2022).

33. See Elena Mejía & Amelia Thomson-DeVeaux, *How Biden Is Reshaping the Courts*, FIVETHIRTYEIGHT (Dec. 7, 2021), <https://fivethirtyeight.com/features/how-biden-is-reshaping-the-courts/> [https://perma.cc/4UUS-SHQU].

individuals and appointed fifty-nine judges to the federal courts as of December 18, 2021.³⁴

B. DIVERSITY AND DECISIONMAKING

A trend underlying the partisan clash over judicial appointments is the stark contrast in who is nominated to the bench by each party. For instance, the majority of Trump judges are white and male, bucking efforts to increase diversity on the bench going back thirty years.³⁵ By comparison, Obama judges are considered the most demographically diverse group of judges in U.S. history.³⁶ According to the American Constitution Society, more than three-quarters of Trump appointees (76.07%) are men, compared to over half (58.05%) of Obama judges.³⁷ Over 84% of Trump judges are white, compared to 63.83% of Obama judges.³⁸ For his part, Biden has taken on the issue of judicial appointments early in his term and appears committed to naming a diverse slate of judges to the bench. As of April 26, 2022, one-quarter of Biden's fifty-nine confirmed judges are men (25.42%), and approximately one-third (35.59%) are white.³⁹

Still, it is worth noting that there remains relatively little diversity of professional experience across the federal judiciary. The vast majority of judges appointed by both Democratic and Republican Presidents come from careers at big law firms protecting corporate interests or serving as federal prosecutors.⁴⁰ Strikingly, just one percent of circuit court judges on the bench spent the majority of their

34. Sahil Kapur, *Biden to Unveil Five New Judicial Nominees, Bringing Total to 90*, NBC NEWS (Apr. 13, 2022, 8:00 AM), <https://www.nbcnews.com/politics/white-house/biden-unveil-five-new-judicial-nominees-bringing-total-90-rcna24145>.

35. Notably, the Seventh Circuit currently has no sitting judges of color. The court's only Black judge, Ann Claire Williams—the first-ever person of color appointed to the circuit and the third Black woman to serve on any federal appeals court—retired from the bench in December 2018. See Press Release, NAACP, NAACP Opposes Trump's Fifth White Nominee to Segregated Appeals Court, Calls on Judiciary Committee Senators to Refuse to Participate in Hearing (Nov. 16, 2020), <https://web.archive.org/web/20201123010930/https://naacp.org/latest/naacp-opposes-trumps-fifth-white-nominee-to-segregated-appeals-court-calls-on-judiciary-committee-senators-to-refuse-to-participate-in-hearing/> [<https://perma.cc/V7LX-XX86>]; *Judge Ann Claire Williams (Ret.)*, JONES DAY, <https://www.jonesday.com/en/lawyers/w/judge-ann-claire-williams?tab=overview> [<https://perma.cc/BA3V-4CB3>] (last visited Apr. 26, 2022).

36. Donna M. Owens, *Obama's Legacy on Judicial Appointments, By the Numbers*, NBC NEWS (Jan. 19, 2017, 9:21 PM), <https://www.nbcnews.com/storyline/president-obama-the-legacy/obama-s-legacy-judicial-appointments-numbers-n709306> [<https://perma.cc/2KBQ-ANQR>].

37. *Diversity of the Federal Bench: Current Statistics on the Gender and Racial Diversity of the Article III Courts*, AM. CONST. SOC'Y, <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/> [<https://perma.cc/KT2H-AP2>] (last visited Apr. 26, 2022).

38. *Id.* The same data show that, in total across all judicial appointees, men make up almost two-thirds of the federal bench, and nearly three-quarters of federal judges are white. *Id.*

39. *Id.*

40. See Maggie Jo Buchanan, *Pipelines to Power: Encouraging Professional Diversity on the Federal Appellate Bench*, CTR. FOR AM. PROGRESS (Aug. 13, 2020), <https://www.americanprogress.org/issues/courts/reports/2020/08/13/489312/pipelines-power-encouraging-professional-diversity-federal-appellate-bench/> [<https://perma.cc/55B9-LD87>]; Mark Joseph Stern, *Democrats' Judicial Selection Process Favors Corporate Lawyers and Prosecutors*, SLATE (July 23, 2020, 4:30 PM), <https://slate.com/news-and-politics/2020/07/biden-judicial-nominations-corporate-lawyers-prosecutors.html> [<https://perma.cc/QMN6-G8AH>].

careers in legal aid jobs or as public defenders, as of August 2020.⁴¹ This trend deprives the bench of varied perspectives on justice and judicial practice, homogenizing how the law is decided in ways that are likely harmful to consumers, workers, and people facing hardship.⁴² Yet while it is still early, Biden-appointed judges are also considered significantly more professionally diverse than judges appointed by prior Administrations, with the President naming public defenders and civil rights attorneys to the bench in historic numbers.⁴³

These diversity trends are important because Article III judgeships are lifetime appointments. As the U.S. population continues to diversify, the federal “judiciary . . . will be even more out of step with the population it will be called upon to serve in the near future” than it is now.⁴⁴ Among other features, experts have argued that diversity on the bench can improve public trust and increase the legitimacy of the courts by better reflecting the overall population.⁴⁵ It can also lead to better decisionmaking by providing a broader range of viewpoints, which can have real impacts for the kinds of choices that judges must make every day. For instance, credibility determinations may sometimes “turn on subtleties such as non-verbal body language,” and cultural differences around body language, such as avoiding eye contact, can lead to “cross-cultural misunderstandings” regarding perceptions of truthfulness.⁴⁶

II. COMPASSIONATE RELEASE AND COVID-19

Since March 2020, state and federal judges across the country have issued tens of thousands of decisions that address threats to incarcerated individuals from the coronavirus. This Note focuses on the federal law permitting requests to free some incarcerated individuals, typically those with serious medical conditions who no longer present a danger to the community.⁴⁷ Part II discusses the history

41. Buchanan, *supra* note 40.

42. *Id.*; see Brian Fallon & Christopher Kang, *No More Corporate Lawyers on the Federal Bench*, ATLANTIC (Aug. 21, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/no-more-corporate-judges/596383/>.

43. Sahil Kapur, *With Public Defenders as Judges, Biden Quietly Makes History on the Courts*, NBC NEWS (Oct. 18, 2021, 8:10 PM), <https://www.nbcnews.com/politics/congress/new-public-defenders-joe-biden-quietly-makes-history-courts-n1281787> [<https://perma.cc/86BG-57KV>].

44. Stacy Hawkins, *Trump’s Dangerous Judicial Legacy*, 67 UCLA L. REV. DISCOURSE 20, 39 (2019).

45. See *Witness Testimony to The Importance of a Diverse Federal Judiciary: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 117th Cong. 1 (2021) (statement of Maya Sen, Professor of Public Policy, Harvard University), <https://docs.house.gov/meetings/JU/JU03/20210325/111405/HHRG-117-JU03-Wstate-SenM-20210325-U1.pdf> [<https://perma.cc/V8ZH-BLSG>]; *Witness Testimony to The Importance of a Diverse Federal Judiciary: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 117th Cong. 1–2 (2021) (statement of Edward M. Chen, J., United States District Court for the Northern District of California), <https://docs.house.gov/meetings/JU/JU03/20210325/111405/HHRG-117-JU03-Wstate-ChenE-20210325-U1.pdf> [<https://perma.cc/JK7W-Q6AY>] [hereinafter Chen Testimony].

46. Chen Testimony, *supra* note 45, at 4.

47. Forty-nine states (all but Iowa) and the District of Columbia also maintain state-level compassionate release programs to provide early release for incarcerated individuals in state prisons under certain circumstances, such as terminal illness. However, these programs remain underutilized

of federal compassionate release, the changes introduced by the First Step Act, and the general health care challenges of the prison setting.

A. HISTORY OF COMPASSIONATE RELEASE

The process of releasing sick and elderly federal inmates was first introduced in the Sentencing Reform Act of 1984.⁴⁸ The program was predicated on the idea that, in some cases, an incarcerated person's circumstances change so significantly that continued confinement is inappropriate—even “cruel.”⁴⁹ For three decades, however, the compassionate release program was barely used. At the time, three entities had authority for managing compassionate release.⁵⁰ The U.S. Sentencing Commission (USSC) created guidelines for determining what kinds of “extraordinary and compelling reasons” supported release, such as terminal illness or advanced age.⁵¹ Incarcerated individuals filed compassionate release requests with the BOP, which, at its sole discretion, brought cases to a court's attention by filing a motion for a reduction in sentencing.⁵² The sentencing court then decided whether to reduce a sentence based on the extraordinary and compelling reasons given and the factors considered when a sentence is imposed, under 18 U.S.C. § 3553(a).⁵³

Critics have argued that BOP frequently “exercised its gatekeeping role to prevent courts from considering compassionate release requests”—developing its own, tougher standards for what constituted extraordinary and compelling

and are often plagued by “incomplete, inconsistent, and at times even incoherent guidelines and rules.” Mary Price, FAMS. AGAINST MANDATORY MINIMUMS, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES 6, 8, 12 (2018), <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf> [<https://perma.cc/RH3R-JU5K>].

48. Pub. L. No. 98-473, 98 Stat. 1987.

49. See Editorial, *What Compassionate Release?*, N.Y. TIMES (Dec. 8, 2012), <https://www.nytimes.com/2012/12/09/opinion/sunday/what-compassionate-release.html> (“When the 1984 law was passed, the Senate Judiciary Committee said compassionate release was intended for ‘the unusual case in which the defendant’s circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner.’”); Hum. Rts. Watch & Fams. Against Mandatory Minimums, *The Answer Is No: Too Little Compassionate Release in US Federal Prisons*, HUM. RTS. WATCH (Nov. 30, 2012), <https://www.hrw.org/report/2012/11/30/answer-no/too-little-compassionate-release-us-federal-prisons> [<https://perma.cc/6TLU-4A37>] (“Congress authorized what is commonly called ‘compassionate release’ because it recognized the importance of ensuring that justice could be tempered by mercy. A prison sentence that was just when imposed could—because of changed circumstances—become cruel as well as senseless if not altered.”).

50. *Compassionate Release and the First Step Act: Then and Now*, FAMS. AGAINST MANDATORY MINIMUMS 1, <https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf> [<https://perma.cc/AW8E-NM62>] (last visited Apr. 27, 2022); see also Lindsey E. Wylie, Alexis K. Knutson & Edie Greene, *Extraordinary and Compelling: The Use of Compassionate Release Laws in the United States*, 24 PSYCH. PUB. POL’Y & L. 216, 231 (2018) (noting “that bureaucratic complexities inherent in the decision to grant compassionate release are one factor in the laws’ underuse”).

51. *Compassionate Release and the First Step Act: Then and Now*, *supra* note 50.

52. *Id.*

53. *Id.* Those factors include: the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment, act as a deterrent, protect the public, and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment; and any pertinent policy statement. 18 U.S.C. §§ 3553(a)(1)–(2), (5).

circumstances, beyond what the statute or the USSC provided.⁵⁴

BOP reportedly limited the grounds for compassionate release to cases where a prisoner was terminally ill and “expected to die within a year” or was “profoundly and irremediably incapacitated.”⁵⁵ Further, because the statute did not provide incarcerated individuals the right to seek compassionate release from the courts on their own, when the Bureau denied a request on grounds of its choosing, the inmate had little recourse.⁵⁶ Between 2013 and 2017, BOP approved over 300 requests for early release, representing six percent of the applications it received from incarcerated individuals.⁵⁷ Meanwhile, during that same period, 266 individuals who requested compassionate release died in custody.⁵⁸ In a 2013 report, the Department of Justice’s Inspector General described the program as “poorly managed and implemented inconsistently”—leading to “inmates not being aware of the program and not being considered for release, and terminally ill inmates dying before their requests were decided.”⁵⁹

B. THE FIRST STEP ACT

In December 2018, Congress modified the compassionate release review process with the passage of the First Step Act. Among other reforms, incarcerated individuals may now petition federal courts directly for a sentence reduction and do not need BOP to initiate a motion on their behalf.⁶⁰ As one court put it in 2019, “[t]he First Step Act did not change the statutory criteria for compassionate release, but it did change the procedures, so that the Bureau of Prisons is no longer an obstacle to a court’s consideration of whether compassionate release is appropriate.”⁶¹ The law was considered modest and, strikingly given the political fractures in Congress these days, it passed with bipartisan support.⁶² There are at

54. *Compassionate Release and the First Step Act: Then and Now*, *supra* note 50.

55. Hum. Rts. Watch & Fams. *Against Mandatory Minimums*, *supra* note 49; *see also* Rachel E. Barkow & Mark Osler, *Designed to Fail: The President’s Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 441–49 (2017) (analyzing findings of Inspector General reports critical of BOP’s compassionate release practices that show the Bureau’s narrow view of release criteria).

56. *Compassionate Release and the First Step Act: Then and Now*, *supra* note 50.

57. Christie Thompson, *Frail, Old and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release.html>; *see also* Hum. Rts. Watch & Fams. *Against Mandatory Minimums*, *supra* note 49 (finding that BOP filed thirty-seven motions between January 2012 and November 2012).

58. Thompson, *supra* note 57.

59. *Statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice Before the United States Sentencing Commission Hearing on “Compassionate Release and the Conditions of Supervision,”* OFF. INSPECTOR GEN. 3, https://oig.justice.gov/sites/default/files/2019-12/t160217_0.pdf [<https://perma.cc/89NF-5MDC>] (last visited Apr. 27, 2022).

60. 18 U.S.C. § 3582(c)(1)(A).

61. Nina J. Ginsberg, *From the President: Compassionate Release: The Nuts and Bolts: Congress Amended 18 U.S.C. § 3582 to Permit Prisoners to File Their Own Motions for Compassionate Release*, CHAMPION (Jan.–Feb. 2020), <https://www.nacdl.org/Article/JanFeb2020-FromthePresidentCompassionateReleaseThe> (quoting *United States v. Fox*, No. 2:14-cr-03-DBH, 2019 WL 3046086, at *3 (D. Me. July 11, 2019)).

62. Dartunorro Clark & Janell Ross, *The First Step Act Promised Widespread Reform. What Has the Criminal Justice Overhaul Achieved So Far?*, NBC NEWS (Nov. 24, 2019, 8:00 AM), <https://www>.

least some on the right who see the prison system as not just overly punitive but also too costly for the government to maintain.⁶³ Nevertheless, the changes put into place under the First Step Act have become particularly significant during the pandemic.⁶⁴

After an incarcerated person files a First Step Act motion seeking compassionate release, a federal court (typically the judge that imposed the initial sentence) may reduce a prisoner's term if the court finds that extraordinary and compelling reasons warrant such a reduction, or, for certain offenders, if the prisoner is at least seventy years of age, the prisoner has served at least thirty years, and a BOP determination has been made that the prisoner is no longer a danger to the safety of any other person or the community.⁶⁵ The court is also required to consider, to the extent applicable, the sentencing factors in the federal sentencing statute, 18 U.S.C. § 3553(a).⁶⁶

C. PRISONS AS "DEATH TRAPS" AND THE URGENT NEED FOR COMPASSIONATE RELEASE

Compassionate release has taken on crucial importance amid the COVID-19 pandemic. As of January 2022, COVID-19 has killed a staggering 982,000 Americans.⁶⁷ The virus has infected more than eighty million people in the United States alone⁶⁸ and has been particularly deadly for older Americans and those with underlying health conditions.⁶⁹ Medical officials continue to urge the

nbcnews.com/politics/politics-news/first-step-act-promised-widespread-reform-what-has-criminal-justice-n1079771 [https://perma.cc/W7PW-KWSZ].

63. See Li Zhou, *Republicans' Civil War over Criminal Justice Reform, Explained*, Vox (Dec. 12, 2018, 4:38 PM), <https://www.vox.com/2018/12/12/18131130/mitch-mcconnell-criminal-justice-reform> [https://perma.cc/H2HS-WB9D]; Osita Nwanevu, *The Improbable Success of a Criminal-Justice-Reform Bill Under Trump*, NEW YORKER (Dec. 17, 2018), <https://www.newyorker.com/news/news-desk/the-improbable-success-of-a-criminal-justice-reform-bill-under-trump>.

64. See Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791, 795–96 (2019) (discussing the changes made under the First Step Act); Casey Tolan, *Compassionate Release Became a Life-or-Death Lottery for Thousands of Federal Inmates During the Pandemic*, CNN (Sept. 30, 2021, 7:05 AM), <https://www.cnn.com/2021/09/30/us/covid-prison-inmates-compassionate-release-invs/index.html> [https://perma.cc/CW3B-LPXL]. Scholars have called on Congress to enact a "true" second-look provision for all incarcerated individuals after a certain period of time. See Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 111 (2019) ("Even if federal judges began releasing people with extraordinary and compelling reasons under the compassionate release provision, Congress should still enact a true second look provision. The criteria for a true second look provision would not require extraordinary and compelling reasons, and it could condition the second look on a particular period of time, such as ten years, with additional reviews at five-year intervals. A true second look would also provide categorical eligibility, meaning everyone would receive an opportunity to be resentenced.").

65. 18 U.S.C. § 3582(c)(1)(A)(i)–(ii).

66. *Id.* § 3582(c)(1)(A).

67. *Coronavirus Case Count*, *supra* note 7.

68. *Id.*

69. *People with Certain Medical Conditions*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [https://perma.cc/Y976-X7W2] (last updated May 2, 2022).

public to wear masks and avoid crowds to reduce the spread of the disease.⁷⁰

Incarcerated individuals face particularly grave risks. As of July 2021, nearly 400,000 cases of COVID-19 had been reported in state and federal prisons,⁷¹ with the total number likely far higher due to a pervasive lack of testing and surveillance.⁷² Over 2,700 incarcerated people had died of the disease by July 2021.⁷³ The situation has been expressed in dire terms: “Prisons, like cruise ships and nursing homes, are virus breeding grounds and human death traps.”⁷⁴ “Prisons are ‘powder kegs for infection’ and have allowed ‘the COVID-19 virus [to] spread[] with uncommon and frightening speed[]’.”⁷⁵ In short, the virus had quickly become “a death sentence in our nation’s prisons.”⁷⁶

Even absent a global pandemic, prisons are categorically hazardous places for people with underlying health risks—and they are also home to a large and growing elderly population with even more acute medical needs.⁷⁷ Incarcerated individuals tend to be less healthy than the general public, and health care in prisons is frequently poor.⁷⁸

Structural conditions in prison have made COVID-19 particularly dangerous for incarcerated individuals. Some facilities require the incarcerated to live in

70. *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> [<https://perma.cc/EB7F-EZ6R>] (last updated Feb. 25, 2022).

71. *A State-by-State Look at 15 Months of Coronavirus in Prisons*, MARSHALL PROJECT (July 1, 2021, 1:00 PM), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> [<https://perma.cc/487U-VY3E>].

72. Peter Eisler, Linda So, Ned Parker & Brad Heath, *Special Report: ‘Death Sentence’ - the Hidden Coronavirus Toll in U.S. Jails and Prisons*, REUTERS (May 18, 2020, 6:38 AM), <https://www.reuters.com/article/us-health-coronavirus-usa-jails-specailr/special-report-death-sentence-the-hidden-coronavirus-toll-in-u-s-jails-and-prisons-idUSKBN22U1V2> [<https://perma.cc/PTQ4-9MKN>].

73. *A State-by-State Look at 15 Months of Coronavirus in Prisons*, *supra* note 71.

74. Opinion, *Editorial: Every Prison Cell Is Now a Coronavirus Death Row*, L.A. TIMES (July 16, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-07-16/prison-coronavirus-outbreak-requires-releases>.

75. *United States v. Salvagno*, 456 F. Supp. 3d 420, 426 (N.D.N.Y. 2020) (first and second alterations in original) (citations omitted) (quoting *United States v. Skelos*, No. 15-CR-317 (KMW), 2020 WL 1847558, at *1 (S.D.N.Y. Apr. 12, 2020)).

76. Lauren-Brooke Eisen & Ruth Sangree, *Covid-19 Is Turning Prison Terms into Death Sentences*, BRENNAN CTR. FOR JUST. (July 31, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/covid-19-turning-prison-terms-death-sentences> [<https://perma.cc/B2T5-WT3Q>].

77. See, e.g., MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 4:1, Westlaw (5th ed. 2021); Evelyn Malavé, Note, *Prison Health Care After the Affordable Care Act: Envisioning an End to the Policy of Neglect*, 89 N.Y.U. L. REV. 700, 701–03 (2014); John V. Jacobi, *Prison Health, Public Health: Obligations and Opportunities*, 31 AM. J.L. & MED. 447, 450 (2005); Jalila Jefferson-Bullock, *Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders*, 79 OHIO ST. L.J. 937, 939–40 (2018).

78. See MUSHLIN, *supra* note 77, § 19:2; Talha Burki, *Prisons Are “in No Way Equipped” to Deal with COVID-19*, 395 LANCET 1411, 1412 (2020), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2930984-3> [<https://perma.cc/4P3L-SL95>]; Beth Schwartzapfel, *How Bad Is Prison Health Care? Depends on Who’s Watching*, MARSHALL PROJECT (Feb. 26, 2018, 5:07 PM), <https://www.themarshallproject.org/2018/02/25/how-bad-is-prison-health-care-depends-on-who-s-watching> [<https://perma.cc/59E8-W4T4>] (describing lawsuits involving health care in prisons).

dormitory-style housing, with many people living in the same space.⁷⁹ In other facilities, where people are held in individual cells, cells often share a ventilation system with others.⁸⁰ Incarcerated individuals may even lack access to basic sanitation supplies, including soap and water, and hand sanitizer, which commonly contains alcohol, can be a prohibited substance.⁸¹ Many facilities are overcrowded, making it difficult to socially distance.⁸² The transfer of incarcerated individuals between prison facilities has also been linked to outbreaks of the virus.⁸³ As a result, incarcerated individuals are infected at a rate more than five times higher than the U.S. population as a whole, and the death rate, adjusted for age and sex, is three times higher.⁸⁴

Congress and the Trump Administration, under Attorney General Barr, took some limited steps to improve conditions in the country's prisons, with a focus on moving some incarcerated people to home confinement.⁸⁵ Unlike compassionate release, which terminates prisoners' sentences, home confinement simply allows individuals to finish out their sentences at home.⁸⁶

A provision in the March 2020 stimulus package, the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, granted the Justice Department and the BOP authority to lengthen the time that a prisoner may be placed on home confinement during the pandemic.⁸⁷ Barr issued several memos in spring 2020 advising BOP and prosecutors on when to seek home confinement and pretrial detention.⁸⁸ However, since the start of the pandemic, the agency has released roughly 41,500 inmates to home confinement⁸⁹ out of more than 153,000 in federal custody,⁹⁰ and “[m]ost of the people who are high risk in prison are still in

79. NATHAN JAMES & MICHAEL A. FOSTER, CONG. RSCH. SERV., R46297, FEDERAL PRISONERS AND COVID-19: BACKGROUND AND AUTHORITIES TO GRANT RELEASE 3 (2020).

80. *Id.*

81. *Id.*

82. See, e.g., Corin Faife, *Alabama's Prisons Are the Most Crowded—if You Look at the Right Data*, APPEAL (Aug. 21, 2019), <https://theappeal.org/alabamas-prisons-are-the-most-crowded-if-you-look-at-the-right-data/> [<https://perma.cc/2C7D-NAJP>].

83. Cary Aspinwall & Ed White, *Moving People—and Coronavirus—from Prison to Prison*, MARSHALL PROJECT (Dec. 21, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/12/21/moving-people-and-coronavirus-from-prison-to-prison> [<https://perma.cc/9ZPF-E7QK>].

84. Brendan Saloner, Kalind Parish, Julie A. Ward, Grace DiLaura & Sharon Dolovich, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602, 602–03 (2020), <https://perma.cc/FGZ2-PWKB>.

85. See JAMES & FOSTER, *supra* note 79, at 14–16.

86. *Understanding the Difference Between Home Confinement, Compassionate Release, and Clemency in the Federal Prison System*, FAMS. AGAINST MANDATORY MINIMUMS, <https://famm.org/wp-content/uploads/Understanding-the-Difference.pdf> [<https://perma.cc/TQR4-DZEX>] (last visited Apr. 28, 2022).

87. JAMES & FOSTER, *supra* note 79, at 12 n.70.

88. *Id.* at 14.

89. *Frequently Asked Questions Regarding Potential Inmate Home Confinement in Response to the COVID-19 Pandemic*, FED. BUREAU PRISONS, <https://www.bop.gov/coronavirus/faq.jsp> [<https://perma.cc/6862-VULP>] (last visited Apr. 28, 2022).

90. *Population Statistics*, FED. BUREAU PRISONS, https://www.bop.gov/mobile/about/population_statistics.jsp [<https://perma.cc/Y6YQ-Y8ZC>] (last updated Apr. 28, 2022).

prison.”⁹¹ The Biden Administration has determined that those granted home confinement during the pandemic will be permitted to serve out the rest of their sentences at home.⁹²

Meanwhile, compassionate release requests, the focus of this Note, have exploded in the wake of the disease. The USSC reports more than 20,000 applications for release were filed between March 2020 and June 2021.⁹³ Nearly 3,600 people—approximately 17.5% of those requests—were granted compassionate release by the courts.⁹⁴ Still, this overall grant rate belies significant differences between judges appointed by Republicans and Democrats, respectively. These differences will be explored further below.

III. ANALYSIS: JUDICIAL DECISIONMAKING IN A PANDEMIC

This Note seeks to quantify how judges are ruling in compassionate release cases during COVID-19 through the lens of judicial appointments. Part III follows in three Sections. First, there is discussion of the rich and growing literature on the significance of judicial ideology and political appointments. Second, the original research and methodology of this Note are introduced. Third, the key findings are explained with a focus on how frequently federal district court judges are granting compassionate release, sorted by political party of the appointing President.

A. MEASURING JUDICIAL IDEOLOGY

The empirical study of judicial opinions and measures of judicial ideology has provoked robust debate. Scholars are divided over theoretical questions regarding the value of studying judicial decisions through a political lens, as well as methodological questions of how to tease out significant effects.⁹⁵ Much of this work has focused on Supreme Court and appellate decisions, although there is a body

91. Rich Schapiro, *Sick Prisoner Wrote 17 Letters Pleading to Be Freed. Covid Silenced Him.*, NBC NEWS (Nov. 22, 2020, 6:00 AM), <https://www.nbcnews.com/news/us-news/sick-prisoner-wrote-17-letters-pleading-be-freed-covid-silenced-n1248424> [<https://perma.cc/YQ29-VCYB>].

92. Josh Gerstein, *Biden Justice Department Reverses on Returning Federal Convicts on Home Detention to Prison*, POLITICO (Dec. 21, 2021, 6:34 PM), <https://www.politico.com/news/2021/12/21/biden-reverses-prison-525884> [<https://perma.cc/9HQN-PQFW>].

93. U.S. SENT’G COMM’N, U.S. SENTENCING COMMISSION COMPASSIONATE RELEASE DATA REPORT: CALENDAR YEARS 2020 TO 2021, at tbl.1 (2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf> [<https://perma.cc/VNF8-3TLH>].

94. *Id.*

95. *See, e.g.*, Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813, 813–14 (2010); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL’Y 133, 133, 136–37 (2009); Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 205–06 (2017); *see also* CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) (considering the role of politics in judicial decisionmaking).

of research that centers on the federal district courts.⁹⁶ The country's district courts tend to receive less attention than the Supreme Court and the circuits, particularly in legal scholarship.⁹⁷ But critically, district court judges hear many more cases than the higher courts in any given year and thus play a central role in the judiciary's day-to-day work.⁹⁸

Past research has found that federal district judges are less ideological than their appellate and high court counterparts.⁹⁹ In their survey of the data, leading legal scholars Lee Epstein, William Landes, and Richard Posner found that Republican-appointed district judges tend to impose heavier criminal sentences than their Democratic counterparts, although they concluded that “[t]he ideological influence is modest . . . [and] ideology plays only a small role at the district court level.”¹⁰⁰

More recently, however, scholars have begun to amend that view. A 2021 paper by two researchers, Ryan Hübert and Ryan Copus, analyzed a dataset of roughly 70,000 civil rights cases before 200 district court judges, finding that the party of presidential appointment has a marked effect on case outcomes.¹⁰¹ The researchers found that Republican appointees led to greater pro-civil-defendant outcomes—fewer settlements and more dismissals.¹⁰² Extrapolating from their findings, Hübert and Copus estimate that Trump's 2016 victory over Hillary Clinton could have produced “anywhere between 6,750 and 9,990 more pro-defendant outcomes in federal civil rights cases” as a result of his district court appointments.¹⁰³ Another recent study determined that judicial ideology, as measured by presidential appointment, may be a key source of racial and gender disparities in criminal sentencing by district court judges.¹⁰⁴ The authors of the study, Alma Cohen and Crystal S. Yang, concluded that “racial disparities in sentencing would be almost halved if federal district courts were comprised of all Democratic-appointed judges.”¹⁰⁵

These works show that the scholarly debate continues over the role of ideology in judicial decisions and best practices for measuring these effects. Growing empirical evidence, however, indicates that the party of the President making

96. See, e.g., Ryan Hübert & Ryan Copus, *Political Appointments and Outcomes in Federal District Courts*, J. POL. (forthcoming) (on file with author).

97. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE* 207 (2013).

98. District courts decide nearly seven times as many cases as the courts of appeals and about 3,000 times as many cases as the Supreme Court. *Id.* at 208.

99. Christopher Zorn & Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 J. POL. 1212, 1213, 1219 (2010) (“[T]he conventional view of decision making in the district courts has been one of enforcing norms in criminal and civil cases rather than making doctrinal pronouncements.” (citations omitted)).

100. See EPSTEIN ET AL., *supra* note 97, at 253.

101. Hübert & Copus, *supra* note 96 (manuscript at 31).

102. *Id.* (manuscript at 2).

103. *Id.* (manuscript at 31).

104. Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, AM. ECON. J., Feb. 2019, at 160, 186.

105. *Id.*

judicial appointments can have a significant impact on the judiciary, even at the district court level, and that the judge faced by a civil plaintiff or criminal defendant matters.

B. METHODOLOGY

Compassionate release represents a significant opportunity to study how Republican judges, including the new slate of Trump judges, could broadly impact civil rights in the coming decades using the new judicial tool provided by the First Step Act.¹⁰⁶ The standards laid out under the law are highly discretionary, as discussed in more detail below, and are being applied in the unprecedented circumstances of the global pandemic. All these conditions provide for a natural experiment to explore in real time how Republican judges are ruling compared to judges appointed by Democrats.¹⁰⁷

To better understand the impact of Republican judges, including recently appointed Trump judges, in the midst of the COVID-19 crisis, this Note examines more than 6,000 district court compassionate release decisions available on Westlaw covering the first ten months of the pandemic.¹⁰⁸ Cases were collected for the period of March 11, 2020, to December 31, 2020, using as the start date the day that the World Health Organization declared COVID-19 a pandemic.¹⁰⁹ This period was selected because it represents the most acute phase of the health crisis (at least to date), ending before the widespread rollout of vaccines began.¹¹⁰

106. The lack of precedent limits the ability to conduct historical comparisons. Another potential challenge is that compassionate release motions are typically brought before the sentencing judge in a given criminal case. Naturally, Trump judges have been on the bench for just a few years and thus are less likely to have motions for release come before them. Still, they have rendered hundreds of compassionate release decisions in light of COVID-19, including cases they have previously heard and those initially heard by judges no longer on the bench.

107. See Fischman & Law, *supra* note 95, at 141 (“Judges themselves find it uncontroversial that there are hard cases in which the law gives out, and in which they therefore can and do draw upon their personal views and preferences rather than choose arbitrarily.”).

108. The search for “‘compassionate release’ ‘3582(c)’” during the relevant time period can be found here: <https://www.westlaw.com/SharedLink/8b6fa664a4fb4589bb4992a43d666b06?VR=3.0&RS=cblt1.0>. The precise number of cases found in the above search may vary slightly as Westlaw further updates its database. These figures were pulled in December 2021. A prior draft of this study used Westlaw’s special collection of COVID-19 cases. See *COVID-19 Cases*, WESTLAW, [https://1.next.westlaw.com/Browse/Home/COVID19LegalMaterialsNews/COVID19Cases?transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Browse/Home/COVID19LegalMaterialsNews/COVID19Cases?transitionType=Default&contextData=(sc.Default)). However, Westlaw has since updated this database to remove compassionate release decisions from the portal and so the findings here were modified using the methodology described above.

109. Helen Branswell & Andrew Joseph, *WHO Declares the Coronavirus Outbreak a Pandemic*, STAT (Mar. 11, 2020), <https://www.statnews.com/2020/03/11/who-declares-the-coronavirus-outbreak-a-pandemic/> [<https://perma.cc/SCU2-BDU3>].

110. The first vaccine in the United States was given on December 14, 2020. See Ben Guarino, Ariana Eunjung Cha, Josh Wood & Griff Witte, *‘The Weapon That Will End the War’: First Coronavirus Vaccine Shots Given Outside Trials in U.S.*, WASH. POST (Dec. 14, 2020), <https://www.washingtonpost.com/nation/2020/12/14/first-covid-vaccines-new-york/>; see also *A Timeline of COVID-19 Vaccine Developments in 2021*, AM. J. MANAGED CARE (June 3, 2021), <https://www.ajmc.com/view/a-timeline-of-covid-19-vaccine-developments-in-2021> [<https://perma.cc/FCC3-V9RQ>] (“If 2020 was dominated by the news of how COVID-19 spread across the globe, putting normal life on hold for most people and overwhelming health care providers, then 2021 has so far been focused on ending the pandemic through vaccine distribution.”).

Results were filtered to include only district court decisions and the remaining 8,019 cases were then exported to an Excel spreadsheet.¹¹¹

Some decisions were excluded: decisions not pertaining to compassionate release, procedural orders, requests for release made to a court without authority to hear the case, and the decisions of magistrate judges.¹¹² In some cases, those seeking release move for reconsideration after a denial or refile their motions after clearing certain administrative hurdles.¹¹³ The dataset includes only the most recent decision in each case—so if compassionate release is granted after it was earlier denied, only the grant is counted. With these limits applied, the database now contains 6,047 decisions.

The results of the cases were hand coded to determine whether each compassionate release motion was granted or denied. For each case, the decision, name of the judge, appointing President, and that President's political party were recorded. Though a simple sorting of judges by presidential appointment does not alone provide a clear guidepost for a judge's personal ideology, researchers have found that presidential appointment is nonetheless "substantially correlated" with other proxies, including the judge's own political affiliation.¹¹⁴ Sorting in this way also provides a broader measure than each judge's individual ideology, instead reflecting how *presidential appointment* correlates with decisions, an approach that necessarily incorporates other factors such as whether a President appoints more white men from certain backgrounds to the bench.¹¹⁵

111. Although this dataset is not limited to only those cases citing the pandemic, close to ninety percent of the cases initially downloaded include direct reference to one or more key terms, including "COVID-19," "COVID," "pandemic," "virus," and "coronavirus." That number is almost assuredly even higher among those cases retained in the final dataset once nongermane decisions were removed. Moreover, even where a decision does not directly cite the pandemic, a judge made that decision in the context of the unprecedented and life-altering global crisis, and thus it seems arguable that such cases should be included from this period of particularly heightened awareness.

112. Nongermane decisions include petitions regarding pretrial detention or habeas petitions. A small number of habeas petitions, particularly those filed pro se, are interpreted by the courts to be motions for compassionate release. Such decisions remain in the database. Only the sentencing court may grant compassionate release. Magistrate decisions adopted by district court judges were also excluded so that the dataset includes only those cases where district court judges are the primary decisionmakers.

113. A court may grant compassionate release "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A). As such, an incarcerated individual must seek release from BOP before going to the court, waiting thirty days if the warden does not respond to the request. Cases denied for lack of exhaustion of administrative remedies were retained in the dataset for several reasons. First, it is not clear when such a denial might deter someone from further seeking release from the court, particularly if the motion was brought pro se. Additionally, in the wake of COVID-19, some courts chose to waive this exhaustion requirement, permitting the incarcerated to seek release even before the thirty-day wait expired. And as with all cases, if a later order is available in the same case, the denial on administrative-remedy grounds has been removed from the dataset.

114. Cohen & Yang, *supra* note 104, at 164.

115. See Hübert & Copus, *supra* note 96 (manuscript at 6) ("Because we are interested in the extent to which presidents' appointments to the district courts impact outcomes in the judiciary, we do not need to know whether our effects are driven by judges' political ideologies. We instead estimate the *direct*

C. KEY FINDINGS

Analysis of the more than 6,000 cases shows significant variation in the granting of compassionate release across judges appointed by Presidents of the two parties. This result is in line with reports from criminal justice experts who have observed a split between Republican-appointed and Democratic-appointed judges on prisoners' rights issues during the pandemic—a departure from earlier eras when those issues were often deprioritized by judges appointed by Presidents from both sides of the aisle.¹¹⁶ The table below provides the top-line results of the study, showing grants and denials for judges by each appointing President.

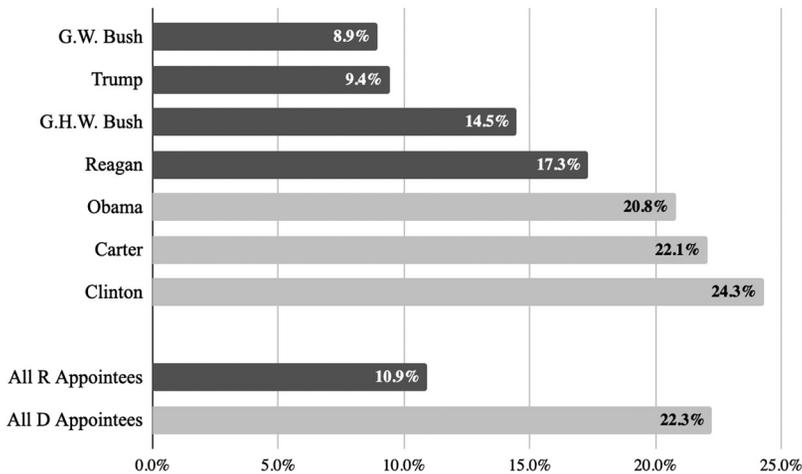
Table 1: Grants and Denials by Judicial Appointment

Appointment	Granted	Denied	TOTAL
Carter	15	53	68
Reagan	64	305	369
G.H.W. Bush	58	342	400
Clinton	323	1006	1329
G.W. Bush	148	1507	1655
Obama	388	1477	1865
Trump	34	327	361
TOTAL	1030	5017	6047

As these results show, district judges appointed by Democrats have been more than twice as likely to grant compassionate release during the COVID-19 pandemic as their Republican counterparts. Republican judges from earlier Administrations, many of whom now have senior status, have also been more likely to grant release relative to judges appointed under both the Trump and George W. Bush Administrations. The table below shows grant rates by judicial appointment for all the compassionate release decisions covered.

effect of assigning a case to a Republican appointee rather than a Democratic appointee. We do so regardless of whether this direct effect is driven by appointees' differing political ideologies or other factors that differ between the judges that Democratic and Republican presidents appoint (such as appointees' races, genders, ages, commitments to certain judicial principles, etc.).").

116. Samuel Weiss, *Federal Judges Were Once All Reliably Bad on Prisoners' Rights Issues. COVID-19 Changed That.*, APPEAL (Oct. 6, 2020), <https://theappeal.org/federal-judges-covid/> [https://perma.cc/968G-F2VZ].

Table 2: Grant Rates by Judicial Appointment

It is worth noting here that partisan affiliation is simply one lens through which to view these data. It is likely that the results also vary significantly by geography, timing of the decision, whether the government opposed release, or whether the incarcerated individual was represented by counsel or made the motion pro se—among other complex factors beyond the reach of this study.¹¹⁷ The data are also limited to what is available on Westlaw.¹¹⁸ Each compassionate release decision is the product of a unique set of circumstances, and this is merely one attempt to understand these decisions through political ideology and its impact on the judiciary.

What's more, although Democratic-appointed judges have granted release at higher rates than their Republican counterparts, the rates for both remain relatively low. Overall, approximately seventeen percent, or less than one in five requests, have been granted—even during this unprecedented period.¹¹⁹ This is likely due to several reasons. Some cases are likely to be stronger or more sympathetic than others. Judges across the aisle have appeared to take seriously the severity of one's underlying conditions in considering whether release during the pandemic is appropriate.¹²⁰ Data from the USSC also show that those who have

117. See, e.g., U.S. SENT'G COMM'N, *supra* note 93, at tbl.2 (finding that grant rates differ significantly across U.S. district courts).

118. Some scholars prefer to use docket sheets scraped directly from court record systems to conduct similar analyses. This is, however, an extremely complex and labor-intensive process, beyond the scope of this Note. See Hübner & Copus, *supra* note 96 (manuscript at 10); Ryan Hübner & Ryan Copus, *Appendix to Political Appointments and Outcomes in Federal District Courts*, J. POL. (forthcoming) (manuscript at 1–6) (on file with author).

119. U.S. SENT'G COMM'N, *supra* note 93.

120. Many judges, see, e.g., *United States v. Adeyemi*, 470 F. Supp. 3d 489, 495–96 & nn.46–51 (E.D. Pa. 2020), have looked to the Centers for Disease Control and Prevention's (CDC) guidance on what types of conditions increase the risk of severe illness or death, see, e.g., *People with Certain Medical Conditions*, *supra* note 69, in making their decisions.

been imprisoned longer have been granted release at higher rates, with the highest grant rates for those sentenced roughly twenty years ago or longer.¹²¹

Additionally, the changes to compassionate release included in the First Step Act were designed to be modest. It was not a bill aimed at widespread decarceration, nor was the new compassionate release process designed with something like a global pandemic in mind.¹²² The process can be confusing and administratively complex, and the bar for release was crafted to be a high one.¹²³ Compassionate release is not a panacea for an overcrowded prison system unable to deal with a global health crisis, although it still has, in some cases, provided an important safety valve for the most vulnerable.

Nevertheless, the disparities in this study underscore the degree to which presidential appointments to the judiciary matter with regards to how policy is set on the ground. In the case of compassionate release, particularly during the pandemic, these differences have had life-and-death consequences.

IV. IMPACT OF THE JUDICIARY

Although the results of this study seek to shed light on the partisan battle over the judiciary—a political fight taking place among some of the country’s most powerful politicians—for those living in prison during this pandemic, the impact is much more immediate. As of October 2021, at least 280 incarcerated individuals had died from COVID-19, including seventy inmates who had applied for compassionate release.¹²⁴

The deceased include Sean McQuiddy, a fifty-four-year-old inmate serving a life sentence for selling crack cocaine, who contracted the virus in December 2020 and died several weeks later.¹²⁵ Although McQuiddy was obese, had high blood pressure, and struggled with asthma—all conditions that put him at risk for

121. See U.S. SENT’G COMM’N, *supra* note 93, at tbl.3. Some courts, see, e.g., *United States v. Zukerman*, 451 F. Supp. 3d 329, 335 (S.D.N.Y. 2020), have also noted that the CDC believes the risks associated with the virus increase with age. See *COVID-19 Risks and Vaccine Information for Older Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> [<https://perma.cc/YHM4-TNF2>] (last updated Aug. 2, 2021).

122. See Rachel Anspach, *The First Step Act, One Year Later: How the Bipartisan Bill Got People Out of Prison and Back with Their Families*, MIC (Dec. 24, 2019), <https://www.mic.com/impact/how-the-first-step-act-got-people-out-of-prison-back-with-their-families-19629720> [<https://perma.cc/6EVC-7DQS>].

123. See, e.g., Emily Widra & Wanda Bertram, *Compassionate Release Was Never Designed to Release Large Numbers of People*, PRISON POL’Y INITIATIVE (May 29, 2020), <https://www.prisonpolicy.org/blog/2020/05/29/compassionate-release/> [<https://perma.cc/2P6G-TMNL>].

124. *Compassionate Release Work in Federal Courts*, UNIV. IOWA COLL. L., <https://law.uiowa.edu/compassionate-release-work-federal-courts> [<https://perma.cc/VL2P-BESY>] (last visited Apr. 29, 2022); see also *280 Deaths in BOP Custody, an Incalculable Loss*, UNIV. IOWA COLL. L. (Oct. 11, 2021), <https://law.uiowa.edu/sites/law.uiowa.edu/files/2021-10/They%20Are%20Human%20Too%20-%2010-11-21.pdf> [<https://perma.cc/2JHZ-6SZM>] (providing names and short bios of those who have died).

125. See Keri Blakinger & Joseph Neff, *‘They Let People Die’: US Prisons Bureau Denied Tens of Thousands Compassionate Release During Covid*, GUARDIAN (June 11, 2021, 9:01 AM), <https://www.theguardian.com/us-news/2021/jun/11/us-prisons-bureau-compassionate-release-covid> [<https://perma.cc/W4UD-UF4K>].

a severe case of COVID-19 or death—his request for compassionate release was not taken up by the court in time to prevent his death.¹²⁶ In January, another federal inmate, Steven Brayfield, a sixty-three-year-old man with Type 2 diabetes, kidney problems, and obesity, died of COVID-19, despite having recently had his motion for release granted, after six months of court battles.¹²⁷ “You keep on thinking, my god, he’s so close to coming home,” Shirley Marler, Brayfield’s mother, told the news site Vice.¹²⁸ “Well, he came home alright, but in a box.”¹²⁹ Stories such as these underscore that judicial decisions like those surrounding compassionate release impact individuals and their families in concrete ways. These fights are about more than political power. They are about people.

And even now, two years after the initial COVID-19 wave, conditions in prisons remain highly dangerous for sick and elderly inmates. Incarcerated people were not prioritized for early vaccines by federal or state officials, despite the known risks.¹³⁰ Some prison workers have also pushed back on demands that they be vaccinated. As of June 2021, just over half of BOP’s employees had been fully vaccinated,¹³¹ and a union representing Bureau workers filed a lawsuit against Biden’s federal vaccine mandate in October.¹³² State prison systems have been facing similar challenges.¹³³ As such, the urgent need for compassionate release of the most vulnerable incarcerated people continues.

Still, for those concerned about these trends, this Note’s results highlight one small, potential bright spot. The Biden Administration appears to be charging ahead on appointing judges to the federal bench in an effort to rebalance the courts. As of December 2021, Biden had named forty judges to the federal bench—tying the record for the most judicial appointees in a single term set by former

126. *See id.*

127. Keegan Hamilton, Samir Ferdowsi & Rob Arthur, *Prisoners Keep Dying of COVID While ‘Compassionate Releases’ Stall in Court*, VICE (Mar. 18, 2021, 6:02 AM), <https://www.vice.com/en/article/jgq7ny/prisoners-keep-dying-of-covid-while-compassionate-releases-stall-in-court> [<https://perma.cc/35GY-MT5K>].

128. *Id.*

129. *Id.*

130. Katie Rose Quandt, *Incarcerated People and Corrections Staff Should Be Prioritized in COVID-19 Vaccination Plans: Some States Are Including Correctional Facilities in Their Rollout Plans. All States and the BOP Should Do So – and Put Incarcerated People Near the Top of the List*, PRISON POL’Y INITIATIVE (Dec. 8, 2020), <https://www.prisonpolicy.org/blog/2020/12/08/covid-vaccination-plans/> [<https://perma.cc/4KHT-ADT6>].

131. Sarah N. Lynch, *Vaccinated Prisoners, Unvaccinated Guards Illustrate Biden’s Tricky Road*, REUTERS (July 29, 2021, 5:02 PM), <https://www.reuters.com/world/us/vaccinated-prisoners-unvaccinated-guards-illustrate-bidens-tricky-road-2021-07-29/>.

132. Courtney Blulé, *Lawsuit Challenges COVID-19 Vaccine Mandate for Federal Prisons Employees*, GOV’T EXEC. (Oct. 30, 2021), <https://www.govexec.com/management/2021/10/lawsuit-challenges-covid-19-vaccine-mandate-federal-prisons-employees/186509/> [<https://perma.cc/R2MX-86X2>].

133. *See, e.g., Court Blocks Covid-19 Vaccine Mandate for California Prisons*, NBC NEWS (Nov. 27, 2021, 7:10 AM), <https://www.nbcnews.com/news/us-news/court-blocks-covid-19-vaccine-mandate-california-prisons-n1284800> [<https://perma.cc/TBT6-USXL>].

President Reagan.¹³⁴ Because judges serve lifetime appointments, it will remain a challenge to reverse the impact of Trump's focus on putting conservative judges on the bench.¹³⁵ The pace of appointments is also likely to slow substantially if Republicans take control of the Senate during the 2022 midterm elections. But Biden's focus on this issue, and his interest in diversifying the courts, sends an important message and could still have ramifications for decades to come.¹³⁶

CONCLUSION

More than two years into the pandemic, we know that the coronavirus poses particular dangers inside prison walls. Prisons are not designed for social distancing, and many facilities are overcrowded. The quality of medical care is often poor, and the incarcerated tend to be less healthy than the general public. Compassionate release, although imperfect, has proved an important vehicle to help at least some inmates escape severe illness or death. Using a unique dataset of more than 6,000 compassionate release decisions issued during the first ten months of the COVID-19 pandemic, this Note has found that Trump and George W. Bush judges are granting sentence reductions less than half as often as judges appointed by Clinton or Obama—and also less frequently than appointees from Republican Administrations under Reagan and George H.W. Bush.

On its face, this is not terribly surprising. Conservative operatives have sharpened their focus in recent decades on appointing more like-minded judges to the bench. It now appears that, under the Biden Administration, Democrats are starting to do the same. The differences between the groups of judges examined here underscore the importance of this fight over future control of the judiciary.

134. Catie Edmondson, *Senate Confirms Biden's 40th Judge, Tying a Reagan-Era Record*, N.Y. TIMES (Dec. 18, 2021), <https://www.nytimes.com/2021/12/18/us/politics/biden-judges-reagan-record.html>.

135. See Elena Mejía & Amelia Thomson-DeVeaux, *It Will Be Tough for Biden to Reverse Trump's Legacy of a Whiter, More Conservative Judiciary*, FIVETHIRTYEIGHT (Jan. 21, 2021), <https://fivethirtyeight.com/features/trump-made-the-federal-courts-whiter-and-more-conservative-and-that-will-be-tough-for-biden-to-reverse/> [https://perma.cc/VV5F-5SQ2].

136. See *id.*