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DIVERSITY AND THE FEDERAL BENCH

CARL TOBIAS*

Justice Sonia Sotomayor's appointment was historic. She is the first Latina Supreme Court member and President Barack Obama's initial appointment. Her confirmation is the quintessential example of his commitment to increasing ethnic and gender diversity in the judiciary; it epitomizes how the administration has nominated and appointed people of color and women to the appellate and district courts. Enhancing diversity honors valuable goals. Selection across a presidency's initial fifteen months also creates the tone. These ideas suggest that the nascent administration's judicial selection merits evaluation, which this paper conducts. Part I briefly assesses modern chief executives' divergent records in naming minority and female judges. Part II descriptively and critically evaluates the Administration's practices for choosing those jurists and the success realized. Ascertaining that Obama expeditiously nominated many well-qualified persons of color and women but the Senate approved few, the last portion offers recommendations for swift confirmation.

I. THE HISTORICAL BACKGROUND

A. *The Early History*

The early history related to diversity deserves brief analysis here, as it has been chronicled elsewhere.¹ Before 1977, minuscule numbers of ethnic minorities and very few women received appointment. In 1967, Thurgood Marshall became the first African American Justice; in 1950, William Hastie was the first African American Circuit Judge; in 1934, Florence Allen became the first female appellate judge; and in 1950, Burnita Shelton Matthews was named the first woman to serve on a U.S. District Court.² Minorities and women have long been underrepresented

* Williams Professor, University of Richmond School of Law. Thanks to Peggy Sanner and Jon Stubbs for ideas, Tracy Cauthorn and Glenice Coombs for processing, and Russell Williams for generous, continuing support. The data in this piece are current through the April 26, 2010 posting date. Errors that remain are mine.

1. SHELDON GOLDMAN, PICKING FEDERAL JUDGES (1997); Tracey George, *Court Fixing*, 43 ARIZ. L. REV. 9 (2001); see MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS (2000).

2. GOLDMAN, *supra* note 1, at 51, 55, 96-97, 101, 185. These were exceptions. The second African American Circuit Judge was appointed in 1962 and the second African American District

on the bench.³ Caucasians constitute 84 percent of lower court judges. Women are one in five. African Americans comprise eight percent. Only 11 of 1300 sitting judges were Asian Americans, and merely one was a Native American when Obama became President.⁴ A female judge has never served on 12 of the 94 districts, while people of color have yet to be jurists in even more districts.⁵

B. *The Modern History*

Before Jimmy Carter's presidency, virtually no minorities and only a tiny number of women served as judges.⁶ Carter vowed to remedy this dearth with special initiatives. He adopted a Circuit Judge Nominating Commission—which vigorously searched for, designated, and helped confirm able persons of color and women—⁷ and requested that senators propose additional minority and female counsel for the trial bench and institute district selection panels to foster confirmation.⁸ The Administration tendered numerous very capable minority and female attorneys and confirmed most. People of color constituted 20, and women 16, percent of its appointees.⁹

Judge in 1961, while the first Latino appellate judge was named in 1979 and the second female appellate judge in 1968. *Id.* at 182–83, 269.

3. Federal Judicial Center, Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Apr. 1, 2010); Carl Tobias, *Diversity on the Federal Bench*, NAT'L L.J., Oct. 12, 2009, at 47, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202434429480&slreturn=1&hblogin=1>; see Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living Up to Them?*, FORUM, Apr. 2009, at 1–6.

4. Federal Judicial Center, *supra* note 3.

5. See, e.g., Jacob Barker, *Gonzaga Professor Nominated to Become Federal Judge*, SPOKESMAN REVIEW, Oct. 13, 2009, <http://www.spokesman.com/stories/2009/oct/13/gonzaga-professor-nominated-become-federal-judge/>; Cheryl Miller, *Seeking A Pioneer*, THE RECORDER, Nov. 26, 2008, <http://www.law.com/jsp/PubArticle.jsp?id=1202426312726>.

6. E.g., Robert J. Lipshutz & Douglas Huron, *Achieving a More Representative Federal Judiciary*, 62 JUDICATURE 483, 484 (1979); see also Elliot E. Slotnick, *Lowering the Bench or Raising It Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270, 271 (1983) (describing the success of steps taken by the Carter Administration to increase diversity).

7. See LARRY C. BERKSON & SUSAN B. CARBON, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES (1980); see also GOLDMAN, *supra* note 1, at 238–50.

8. ALAN NEFF, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS 149 (1981); *Federal Judicial Selection: The Problems and the Achievements of Carter's Merit Plan*, 62 JUDICATURE 463–510 (1979).

9. See, e.g., George, *supra* note 1, at 19; Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318 (1989); see also GOLDMAN, *supra* note 1, at 236–84.

Once Ronald Reagan captured the presidency in 1980, he argued that the election was a mandate to increase conservatism on the judiciary.¹⁰ Reagan selected and confirmed many appellate and district jurists with ideologically conservative perspectives. He appointed practically no minorities and few women.¹¹ When President George H. W. Bush secured election during 1988, he essentially followed Reagan's selection philosophy and deployed analogous practices.¹² Bush named many conservative judges while forwarding and appointing small numbers of minority practitioners, but he did submit and confirm numerous female lawyers.

After Bill Clinton won the presidency in 1992, he emphasized competence and diversity, used selection to further his centrist agenda, and instituted particular actions to choose and appoint many talented persons of color and women.¹³ He wrote the Democratic senators urging them to propose very capable minority and female attorneys.¹⁴ Thus, Clinton selected well-qualified jurists who expanded ideological balance, appointing people of color and women in record numbers. Despite his concerted endeavors, Republican and Democratic squabbling halted or delayed confirmation for a number of talented minorities and women.¹⁵

President George W. Bush triumphed in 2000 partly by asserting that he would name strict constructionists, and attempts to honor this vow help explain his 2004 reelection.¹⁶ Nonetheless, when Bush proposed lawyers whom Democrats opposed as too conservative, even invoking filibusters, this stymied appointments.¹⁷ Charges, retorts, and paybacks vexed

10. See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 137–38 (2005); DAVID M. O'BRIEN, *TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION, JUDICIAL ROULETTE* 60–64, 66 (1988).

11. Not even two percent of Reagan's choices were African Americans. George, *supra* note 1, at 10; Goldman, *supra* note 9, at 322; see GOLDMAN, *supra* note 1, at 285–345; O'BRIEN, *supra* note 10, at 60–64.

12. See, e.g., Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 *JUDICATURE* 282, 283 (1993) (analyzing how Bush followed Reagan's philosophy and practices); Carl Tobias, *More Women Named Federal Judges*, 43 *FLA. L. REV.* 477 (1991) (analyzing Bush's appointment of women).

13. See George, *supra* note 1, at 11, 19; Sheldon Goldman & Elliot E. Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 *JUDICATURE* 265, 266 (1999) (assessing Clinton's emphasis on diversity).

14. Neil A. Lewis, *Unmaking the G.O.P. Court Legacy*, *N.Y. TIMES*, Aug. 23, 1993, at A10.

15. Both parties share much blame. Goldman & Slotnick, *supra* note 13, at 284; Carl Tobias, *Choosing Judges at the Close of the Clinton Administration*, 52 *RUTGERS L. REV.* 827, 846 (2000).

16. E. J. Dionne, *Talking Sense on Court Choices*, *WASH. POST*, Nov. 23, 2004, at A29, available at <http://www.washingtonpost.com/wp-dyn/articles/A6005-2004Nov22.html>.

17. Press Release, George W. Bush, President Bush Says Senate Filibuster Decision a "Disgrace" (Mar. 6, 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/>

selection. Bush named many conservatives and numerous women but relatively few minorities.¹⁸

II. EARLY JUDICIAL SELECTION

A. Descriptive Analysis

1. General Approach

The Administration swiftly planned selection, quickly naming Gregory Craig, an expert lawyer, as White House Counsel,¹⁹ and calling on Vice President Joe Biden's nearly 40-year Judiciary panel experience to facilitate nominations and confirmations.²⁰ Obama attempted to foresee and treat potential concerns. For example, he assembled "short lists" of excellent prospects, should there be a Supreme Court vacancy. His White House, as most, retained full control over that area, much over circuit appointments,²¹ and some over district choices. This Department of Justice (DOJ), like many, assumed certain responsibility for selection and much to

20030306.html. For analyses of judicial filibusters, see Erwin Chemerinsky & Catherine Fisk, *In Defense of Filibustering Judicial Nominees*, 26 CARDOZO L. REV. 331 (2005); John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181 (2003).

18. Jennifer Diascro & Rorie Solberg, *George W. Bush's Legacy on the Federal Bench*, 92 JUDICATURE 289 (2009); see Robert Carp et al., *The Decision-Making Behavior of George W. Bush's Judicial Appointees*, 92 JUDICATURE 312 (2009) (finding Bush judges the most conservative of all modern administrations); Rorie Solberg, *Diversity and George W. Bush's Appointments*, 88 JUDICATURE 276 (2005) (finding that Bush nominated a "fair number of women and minorities" and had some success nominating Latinos).

19. Marisa McQuilken & Joe Palazzolo, *Will Counsel's Office Expand Policy Role?*, NAT'L L.J., Feb. 10, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202428135994&hbxlogin=1> (subscription required); Jon Ward, *White House Beefs Up Legal Staff*, WASH. TIMES, July 21, 2009, at B1, available at <http://www.washingtontimes.com/news/2009/jul/21/white-house-beefs-up-legal-staff/print/>; see also CHRISTINE L. NEMACHECK, *STRATEGIC SELECTION* (2007); Peter Baker & Adam Nagourney, *Tight Lid Defined Process In Selecting a New Justice: Using Past Battles to Avert Pitfalls*, N.Y. TIMES, May 28, 2009, at A17, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0DE7DA113AF93BA15756C0A96F9C8B63>; Jeffrey Toobin, *Bench Press*, NEW YORKER, Sept. 21, 2009, at 42.

20. Keith Koffler, *Biden's Staff to Play Key Role in Sotomayor Confirmation*, ROLLCALL, May 26, 2009, available at <http://www.rollcall.com/news/35256-1.html> (subscription required).

21. Circuits cover multiple states and have fewer openings, which are more critical, as they are courts of last resort in 99 percent of cases and decide controversial issues, such as abortion. Jennifer Koons, *Obama Nominees Could Reshape Industry-Friendly Judiciary*, N.Y. TIMES, Aug. 20, 2009, <http://www.nytimes.com/gwire/2009/08/20/greenwire-obama-nominees-could-reshape-industry-friendly-68829.html>; Neil A. Lewis, *Move to Limit Clinton's Judicial Choices Fails*, N.Y. TIMES, Apr. 30, 1997, at D22, available at <http://www.nytimes.com/1997/04/30/us/move-to-limit-clinton-s-judicial-choices-fails.html?pagewanted=1>; see RICHARD A. POSNER, *THE FEDERAL COURTS* 80-81 (1996) (providing data on shrunken Supreme Court docket).

prepare nominees.²² Obama consulted Democratic *and* GOP Judiciary Committee members and senior party officials from states with vacancies *before* actual nominations.²³ Many of these officials use commissions that forward promising designees they recommend to Obama, who then nominates.²⁴ Most suggested are highly competent and diverse in terms of ethnicity, gender, and ideology.²⁵

Before and after nominations, Obama cooperated with Senators Patrick Leahy (D-Vt.), the Judiciary chair, who arranges hearings and votes; Harry Reid (D-Nev.), the Majority Leader, who schedules floor action; and their GOP counterparts, Senators Jeff Sessions (R-Ala.) and Mitch McConnell (R-Ky.).²⁶ The panel swiftly processed nominees, yet few secured hearings before the August 7 recess.²⁷ The minority also routinely delayed committee votes for a week absent justification. It held over several female circuit prospects but unanimously approved them the next week and similarly treated four California District Court possibilities, while Sessions orchestrated a party-line vote against one California nominee, arguing that Magistrate Judge Edward Chen's ACLU representation might preclude him from impartially applying the law.²⁸

22. Obama also reinstated ABA analysis *before* nominations because review discovers concerns, thus saving time and embarrassment. Terry Carter, *Do-Over: After an Eight-Year Pause, The ABA is Again Vetting Federal Bench Nominees*, A.B.A. J., May 2009, at 62; Editorial, *The A.B.A. and Judicial Nominees*, N.Y. TIMES, Apr. 14, 2009, at A22, available at <http://www.nytimes.com/2009/04/14/opinion/14tue2.html>.

23. Texas GOP Senators Kay Bailey Hutchison and John Cornyn asked to participate and even proposed names. Gary Martin, *Texas Dems Release Candidates to Federal Judicial Posts*, SAN ANTONIO EXPRESS-NEWS, Oct. 8, 2009, at 1B, available at <http://www.mysanantonio.com/news/63710137.html>.

24. E.g., Bob Egelko, *Feinstein Taps Bipartisan Panel to Pick Judge Candidates*, SAN FRANCISCO CHRON., Jan. 5, 2009, at A1, available at http://articles.sfgate.com/2009-01-05/bay-area/17197030_1_city-attorney-president-s-party-panels; Press Release, Kay Hagan, Senator Hagan Announces Suggestions For Nominees (July 10, 2009), available at http://hagan.senate.gov/?p=press_release&id=229. Most White Houses seek a few names.

25. Tricia Bishop, *City Judge Nominated for Court of Appeals*, BALT. SUN, Apr. 3, 2009, at 3A, available at http://articles.baltimoresun.com/2009-04-03/news/090402105_1_district-court-court-of-appeals-davis/; Joe Ryan, *Obama Nominates Newark Judge*, STAR-LEDGER, June 19, 2009, at 16; Carol Williams, *Obama Picks 4 New Judges*, L.A. TIMES, Aug. 9, 2009, at A37.

26. See *supra* note 18; DOJ OLP Federal Judicial Nominations, <http://www.justice.gov/olp/judicialnominations111.htm> (last visited Apr. 1, 2010).

27. It used full questionnaires and hearings. Leahy held hearings so quickly that GOP members sought more time, and he granted another session for one nominee. Maureen Groppe, *No Sparks Fly at Hearing*, INDIANAPOLIS STAR, Apr. 30, 2009, at A3; David Ingram, *Specter's Move Upsets Judge Plan*, NAT'L L.J., May 4, 2009, at LT1, LT12; see also Toobin, *supra* note 19, at 43 (stating that as of the time of publication of the article, "the only Obama nominee who ha[d] been confirmed to a lifetime federal judgeship [was] Sotomayor").

28. See *Exec. Bus. Mtg. Before the S. Comm. on the Judiciary*, 111th Cong. (2009), <http://judiciary.senate.gov/hearings/hearing.cfm?id=4118> (webcast); 155 CONG. REC. S10,750, S10,754 (daily ed. Oct. 27, 2009) (Statement of Sen. Sessions); Letter from Sen. Jeff Sessions (R-Ala.) to

The chamber did not act on lower-court nominees prior to September, partly because the Supreme Court process consumed three months in which little other selection activity occurred.²⁹ McConnell failed to cooperate later in arranging floor consideration, even rejecting temporal accords, while individual Republicans placed anonymous holds on uncontroversial nominees, both of which delayed the process and essentially required that Democrats file cloture petitions.³⁰ The lawmakers have also requested much debate time for nominees they eventually supported. Illustrative is Roberto Lange. The GOP sought two hours but used only five minutes, and he was approved 100–0.³¹ Persons of color and women, such as Judges Andre Davis and Beverly Martin, waited months to have floor votes.³² Sessions and numerous GOP colleagues have deemed controversial, mainly for ideological reasons, nominees like Judges David Hamilton, Davis, and Chen, who formerly would have prompted minimal controversy. Sessions stated that Hamilton has “drive[n] a political agenda,”³³ embracing the “empathy standard” and “the idea of a living Constitution;”³⁴ asserted that Davis “has been reversed quite a number of times;”³⁵ and doubted Chen would be a neutral umpire.³⁶ He summarized these ideas: “I think we’re seeing a common DNA run through the Obama nominees, and that’s the ACLU chromosome.”³⁷ Even had Democrats invoked cloture to force earlier

Senate colleagues, Oct. 30, 2009 [hereinafter Sessions Letter]; *infra* note 33. Sessions deemed most of these nominees satisfactory, and he characterized Justice Barbara Keenan as a “fine nominee.” *Exec. Bus. Mtg. Before the S. Judiciary Comm.* 111th Cong. (2009), <http://judiciary.senate.gov/hearings/index.cfm?t=month&d=10-2009&p=meetings> (webcast).

29. Koons, *supra* note 21; Alex Leary, *Supreme Court Seat Not Only One Empty*, ST. PETERSBURG TIMES, Aug. 6, 2009, at 1A.

30. 156 CONG. REC. S820 (daily ed. Feb. 26, 2010) (providing cloture petition on Justice Barbara Keenan); 155 CONG. REC. S11,421–22 (daily ed. Nov. 17, 2009) (providing cloture vote on Judge David Hamilton); 155 CONG. REC. at S10,752 (daily ed. Oct. 27, 2009) (statement of Sen. Cardin).

31. 156 CONG. REC. S820 (daily ed. Feb. 26, 2010); 155 CONG. REC. S10,601 (daily ed. Oct. 21, 2009); Alex Kingsbury, *Obama Slower Than Bush to Confirm Justices*, U.S. NEWS & WORLD REP., Nov. 6, 2009, <http://www.usnews.com/news/articles/2009/11/06/obama-slower-than-bush-to-confirm-justices.html>.

32. Doug Kendall, *The Bench in Purgatory*, SLATE, Oct. 26, 2009, <http://www.slate.com/id/2233309> (assessing GOP delay); *see also* 155 CONG. REC. S11282 (daily ed. Nov. 9, 2009) (referring to Davis). For Martin, *see* 156 CONG. REC. S513 (daily ed. Jan. 20, 2010); Bill Rankin, *Martin’s Nomination Clears Important Senate Hurdle*, ATLANTA J.-CONST., Sept. 10, 2009, <http://www.ajc.com/news/atlanta/martins-nomination-clears-important-135493.html>. *But see* 155 CONG. REC. S10,753 (daily ed. Oct. 27, 2009) (statement of Sen. Sessions).

33. Sessions Letter, *supra* note 28.

34. 155 CONG. REC. S10,753 (daily ed. Oct. 27, 2009).

35. *Id.* at S10,754.

36. *Id.*

37. *Exec. Bus. Mtg. Before the S. Comm. on the Judiciary*, 111th Cong. (2009), <http://judiciary.senate.gov/hearings/hearing.cfm?id=4118> (webcast).

votes, the GOP would have secured 30 hours of debate, thus consuming precious floor time.³⁸

Obama has tapped nineteen appellate and forty-four district nominees, the Judiciary panel has approved twelve circuit and thirty-one district prospects, and the Senate has confirmed nine appellate, and eleven district, nominees.³⁹ The Senate confirmed Judge Sotomayor to replace Justice David Souter, who retired, giving prompt evaluation top priority.⁴⁰ Clinton appointed to the district bench ten very competent Obama appellate nominees.⁴¹ Eleven district prospects are Magistrate Judges and thirteen are state jurists.⁴²

2. Diversity

Obama has emphasized diversity.⁴³ He has instituted particular efforts to improve diversity, as reflected in tapping and appointing many people of color and women. The President has concomitantly approached less conventional entities, such as minority and women's groups that know myriad possible nominees. He has also reached out to minority and female legislators, who have identified diverse candidates and helped them negotiate the selection gauntlet.

The White House has suggested that officials and their panels adopt special initiatives to recommend persons of color and women. Most commissions have efficaciously sought out, analyzed, and proposed a number of skilled, diverse lawyers. For example, one panel interviewed 40

38. S. RULE 22 (2010), available at <http://rules.senate.gov/public/index.cfm?p=RuleXXII>; Michael A. Fletcher, *Obama Criticized as Too Cautious, Slow on Judicial Posts*, WASH. POST, Oct. 16, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/15/AR2009101504083.html>.

39. U.S. Courts, Summary of Judicial Vacancies, <http://www.uscourts.gov/judicialvac.cfm> (last visited Apr. 26, 2010); DOJ OLP, *supra* note 26; S. Comm. on the Judiciary, Judicial Nomination Materials: 111th Congress, <http://judiciary.senate.gov/nominations/111thCongressJudicialNominations/Materials111thCongress.cfm> (last visited Apr. 26, 2010).

40. Six appointees are African Americans, three are Asian Americans, one is a Latino, and nine are women. *See* Federal Judicial Center, *supra* note 3.

41. DOJ OLP, *supra* note 26. Elevating district judges is venerable, as they have been confirmed and have easily assessed records. Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, Apr. 10, 1990, at A1.

42. This could suggest a career judiciary's institution. Russell Wheeler, *The Changing Face of the Federal Judiciary* GOVERNANCE STUD. AT BROOKINGS (Brookings Inst., Washington, D.C.), at 7–9, available at http://www.brookings.edu/papers/2009/08_federal_judiciary_wheeler.aspx (observing trend to look for prior judicial experience). Magistrate Judges' records are easily assessed. *See supra* note 41.

43. *See* Letter from Gregory Craig, White House Counsel, to President Barack Obama (Nov. 13, 2009); *see generally supra* note 18.

candidates and sent an African American and a Latino for the Fourth Circuit,⁴⁴ while others submitted four Asian American California District Court prospects.⁴⁵ Many elected figures have pursued, assessed, and suggested numerous qualified people of color and women. For instance, the Maryland, New Jersey, and Rhode Island senators proposed African American designees for the Fourth, Third, and First Circuits, and New York's senators proffered an Asian American jurist for the Second; all four received nomination.⁴⁶

Obama has searched for, evaluated, tapped, and confirmed many able persons of color and women, numbers of whom are federal or state court judges.⁴⁷ His nineteen appellate court prospects include five African Americans, two Asian Americans, two Latinos, and six women, and the forty-four district nominees encompass eleven African Americans, six Asian Americans, three Latinos, and twenty-one women.⁴⁸ Obama has also proffered diverse counsel whom the GOP supports. For example, he picked Northern District of Georgia Judge Martin and Nashville attorney Jane Stranch, whom the Georgia and Tennessee senators favored,⁴⁹ while Judge Martin and many other nominees illustrate the value of elevating judges.⁵⁰ Moreover, Obama has chosen Republican appointees, namely Justice Sotomayor, and capable lawyers with GOP ties.⁵¹ Three African American and one Latino circuit nominees and four Asian American prospects earned the highest ABA rating; well-qualified.⁵² The latter group

44. Jim Morrill, *White House Evaluates Diaz for 4th Circuit Court*, CHARLOTTE OBSERVER, Oct. 9, 2009, at 1A, available at <http://www.charlotteobserver.com/408/story/992162.html>; *infra* note 52.

45. The panels were named by California Democratic Senators Dianne Feinstein and Barbara Boxer, who sent the candidate names to Obama who nominated the four. Bob Egelko, *Asian American Nominated to S.F. Federal Court*, SAN FRANCISCO CHRON., Aug. 8, 2009, at C1, available at http://articles.sfgate.com/2009-08-08/bayarea/17174966_1_courts-attorney-law-school.

46. Bishop, *supra* note 25 (Md.); John E. Mulligan, *Obama Taps R.I. Judge for Court*, PROVIDENCE J., Oct. 7, 2009, at A1 (R.I.); Ryan, *supra* note 25 (N.J.); Benjamin Weiser, *Madoff's Sentencing Judge To Be Appellate Court Choice*, N.Y. TIMES, Sept. 10, 2009, at A37, available at [http://query.nytimes.com/gst/fullpage.html?res=9C0DE7D61431F933A2575AC0A96F9C8B63\(N.Y.\)](http://query.nytimes.com/gst/fullpage.html?res=9C0DE7D61431F933A2575AC0A96F9C8B63(N.Y.)); DOJ OLP, *supra* note 26.

47. DOJ OLP, *supra* note 26; see Goldman, *supra* note 3 (offering Presidents' records since Nixon).

48. DOJ OLP, *supra* note 26.

49. Rankin, *supra* note 32; Ken Whitehouse, *Senate Close to Filling Sixth Circuit Post*, NASHVILLE POST, Oct. 28, 2009, http://www.nashvillepost.com/news/2009/10/28/6th_circuit_position_appears_close_to_being_filled_by_us_senate.

50. See *supra* notes 41–42.

51. See Neil A. Lewis, *After Delay, Senate Approves Judge for Court in New York*, N.Y. TIMES, Oct. 3, 1998, at B2, available at <http://www.nytimes.com/1998/10/03/nyregion/after-delay-senate-approves-judge-for-court-in-new-york.html?pagewanted=1>; see also Carl Tobias, *The Federal Appellate Court Appointments Conundrum*, 2005 UTAH L. REV. 743, 770 (2005).

52. They are well-respected sitting District Judges Andre Davis and Joseph Greenaway, North

would be the first Asian American Second Circuit member, the only active Asian American Ninth Circuit Judge, the initial Vietnamese American District Judge, and the first Asian American Northern District of California Judge.⁵³

The President has appeared to stress diversity because it yields multiple benefits. For instance, numerous people of color and women help other judges understand and decide complex issues respecting questions, namely abortion and discrimination,⁵⁴ and hold different, valuable perspectives in discrete fields, such as criminal procedure and employment law,⁵⁵ although a recent evaluation of female judges found little evidence of difference between women and men.⁵⁶ Obama's minority and female nominees might enlarge ideological diversity, as a number seem to favor the ideas of a "living Constitution" or empathy.⁵⁷ Insofar as they do, he could justify this because Republicans appointed conservatives and majorities to numerous circuits,⁵⁸ and Obama has deemphasized ideology.⁵⁹ Persons of color and women may also help limit the racial,

Carolina Court of Appeals Judge James Wynn and North Carolina Superior Court Judge Albert Diaz. DOJ OLP, *supra* note 26; *see generally supra* notes 25, 44.

53. They are Southern District of New York Judge Denny Chin, University of California at Berkeley Law Professor Goodwin Liu, Los Angeles County Superior Court Judge Jacqueline Nguyen and Northern District of California Magistrate Judge Edward Chen. They, as well as Chicago attorney Edmond Chang, Los Angeles counsel Dolly Gee, District of Hawaii Magistrate Judge Leslie Kobayashi and Santa Clara County Superior Court Judge Lucy Haeran Koh, would expand by more than 70 percent the Asian American jurists. *See supra* note 4 and accompanying text. The Senate has confirmed Judge Chin for the Second Circuit as well as Judges Gee and Nguyen for the Central District of California.

54. *See* Theresa Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 599–600, 610–17 (2003); George, *supra* note 1, at 20–21.

55. *See, e.g.,* Madhavi McCall, *Structuring Gender's Impact: Judicial Voting Across Criminal Justice Cases*, 36 AM. POL. RES. 264 (2008) (concluding that judge gender is a significant factor in the outcome in criminal proceedings); Jennifer Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005) (finding a correlation between gender and Title VII sex discrimination and sexual harassment cases).

56. Stephen Choi et al., *Judging Women* (University of Chicago School of Law, Law & Economics Olin Research Paper Series Paper No. 483, 2009), available at <http://ssrn.com/abstract=1479734>; *see also* Stephen Choi et al., *Do Women Make Better Judges?*, SLATE, Oct. 2, 2009, <http://www.slate.com/id/2231166/>.

57. For general discussions of these ideas, *see* STEPHEN BREYER, *ACTIVE LIBERTY* (2005); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987). *But see* ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997); Curt Levey, *Living Constitution, R.I.P.*, NAT'L REV., Sept. 30, 2005.

58. Russell Wheeler, *How Might the Obama Administration Affect the Composition of the U.S. Courts of Appeals?* (BROOKINGS, Mar. 18, 2009), http://www.brookings.edu/opinions/2009/0318_courts_wheeler.aspx?rssid=wheelerr; Goldman, *supra* note 3, at 6–8. Thus, his electoral success was ostensibly a mandate to restore balance.

59. He may believe that the political branches can better adopt social change than unelected judges. Toobin, *supra* note 19, at 47. Sotomayor and other nominees have disavowed empathy. 155

gender, and other types of bias that afflict the judicial process.⁶⁰ A bench whose composition essentially reflects America instills greater public confidence.⁶¹ Expanding diversity also illustrates the Administration's commitment to enhancing conditions for minorities and women across the profession, the justice system, and the nation.⁶²

B. Critical Analysis

Most striking is how Obama eclipsed his predecessors vis-à-vis early, diverse nominations,⁶³ but only eleven people of color and ten women have been appointed.⁶⁴ Some phenomena over which the nascent administration and Senate majority lacked great control appear to explain their records. Foremost was a Supreme Court vacancy. On May 1, Justice Souter announced he would retire, and this demanded rapid, constant attention.⁶⁵ Obama's aides quickly instituted many actions to help choose the nominee,⁶⁶ familiarize the Senate and the public with Judge Sotomayor, and assist her preparation.⁶⁷ The chamber⁶⁸ and the panel

CONG. REC. S11,275 (daily ed. Nov. 9, 2009) (statement of Sen. Sessions).

60. See, e.g., NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS AND ETHNIC FAIRNESS: FINAL REPORT (1997); FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990).

61. See, e.g., Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253, 255–56 (1978); Sylvia R. Lazos Vargas, *Only Skin Deep? The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1442 (2008). See generally Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000).

62. Carl Tobias, *Dear President Bush: Leaving a Legacy on the Federal Bench*, 42 U. RICH. L. REV. 1041, 1048 (2008).

63. His confirmations and nominations are somewhat fewer than those of recent Presidents. VACANCIES IN THE FEDERAL JUDICIARY (1993 & 2001).

64. The people of color are Justice Sotomayor; Circuit Judges Chin, Davis, Greenaway, and Rogeriee Thompson; and District Judges Irene Berger, Gee, Charlene Honeywell, Abdul Kallon, Lange, and Nguyen. The women are Justice Sotomayor; Circuit Judges Keenan, Martin, and Thompson; and District Judges Berger, Gee, Honeywell, Nguyen, Rosanna Peterson, and Christina Reiss. DOJ OLP, *supra* note 26. The small numbers thus far and the early date warrant caution.

65. Peter Baker & Jeff Zeleny, *Souter's Exit to Give Obama First Opening*, N.Y. TIMES, May 1, 2009, <http://www.nytimes.com/2009/05/02/us/02souter.html>; sources cited *supra* note 18. Obama had prepared for that. *Supra* text accompanying notes 19–25; Christi Parsons & Tom Hamburger, *Obama's Supreme Court Pick Machinery*, CHI. TRIB., May 2, 2009, http://www.swamppolitics.com/news/politics/blog/2009/05/obamas_supreme_court_pick_mach.html.

66. They assessed the short list, collected and analyzed more names, consulted senators, and narrowed the field. Baker, *supra* note 19; Robert Barnes & Shailagh Murray, *High Court Buzz Centers on Chicago Judge and Solicitor General*, WASH. POST, May 21, 2009, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/20/AR2009052003537.html>.

67. Toobin, *supra* note 19, at 44–45. They answered inquiries, helped her respond to the questionnaire and held mock hearings. Shailagh Murray & Michael D. Shear, *First Latina Picked for Supreme Court; GOP Faces Delicate Task in Opposition*, WASH. POST, May 27, 2009, at A1,

similarly responded.⁶⁹ Officials devoted three months to the process, time not invested on lower-court selection.⁷⁰ Moreover, the record is explained by a new government's "start up" costs, including the urgent need to address many stubborn problems that the earlier Administration had not resolved.⁷¹

The GOP also cooperated little. The minority invoked the numerous rare, and some unprecedented, tools detailed above. When the party regularly holds over without explanation minority and female nominees it later approves, this appears meant to prolong confirmation and secure partisan benefit. Senator Jeff Sessions admitted that the GOP strategy is "delay and conquer" when addressing claims about obstruction.⁷² Senator Mitch McConnell's refusal to enter time agreements and many senators' placements of anonymous holds on uncontroversial nominees multiply delay because they prolong the selection process, sometimes even necessitating cloture and devouring valuable floor time; eviscerate practically the last vestiges of civility in selection; exacerbate the confirmation wars; and may provoke Democratic retaliation. The numerous tactics documented unnecessarily halt or slow confirmation, require nominees to place their lives on hold, dissuade respected candidates from actually entertaining bench service, deprive courts of judicial resources that they desperately need, and undermine public regard for appointments and the branches of government.

available at <http://www.washingtonpost.com/wpdyn/content/article/2009/05/26/AR2009052601313.html>.

68. Nearly all senators privately interviewed the nominee, some multiple times.

69. The staffs also prepared for the extensive hearings and crafted follow-up questions and reviewed the answers.

70. This was like Clinton's first year, when Justice Byron White retired. Linda Greenhouse, *The Supreme Court; White Announces He'll Step Down From High Court*, N.Y. TIMES, Mar. 20, 1993, at 11, available at <http://www.nytimes.com/books/98/08/23/specials/white-stepdown.html>; see ORRIN HATCH, SQUARE PEG 179-80 (2002).

71. They included the recession, Guantanamo, Iraq, and the U.S. global reputation. Furthermore, many DOJ and U.S. Attorney nominees lacked approval. Peter Baker, *Obama's Team Is Lacking Most of Its Top Players*, N.Y. TIMES, Aug. 24, 2009, at A1; see Ruth Marcus, *Advise and Stall*, WASH. POST, Oct. 7, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/06/AR2009100602836.html?sid=ST2009100603081>.

72. See ALLIANCE FOR JUSTICE, JUSTICE CAN'T WAIT 2 (2009), www.afj.org/check-the-facts/nominees/alliance-for-justice-report-justice-can-t-wait-the-first-ten-months-of-the-obama-administration.pdf (citing Dan Friedman, *Battle Affects Unopposed Judges*, NAT'L J. COM., Oct. 28, 2009) ("I think they have a strategy, if they get out aggressively pushing back on nominees, that they can create a perception that we're delaying a lot of nominees, and it will be harder for us to delay nominees.").

III. SUGGESTIONS FOR THE FUTURE

A. *The Executive Branch*

Obama has adopted lucid, thorough objectives for increasing diversity and salutary procedures to achieve them, and he should continue so acting.⁷³ For instance, he has considered merit to be the touchstone, steadily proffering sufficient, able people of color and women, whom the Senate may efficiently process.⁷⁴ Obama has improved diversity with the endeavors scrutinized, namely contacting minority and female legislators, tapping prospects whom the GOP favors, and elevating judges.⁷⁵ The initiatives have been fruitful and set records for nominating and appointing talented, diverse lawyers at this early juncture in a new Administration.⁷⁶ Thus, Obama should continue applying measures that have proved effective. However, the President may want to reconsider less efficacious actions implemented thus far and—if he discovers parameters that could be improved—adjust or redouble some efforts, consult prior Administrations' successful concepts, or assess other constructive practices.

For example, should elected officials or advisory panels send insufficient competent, diverse prospects, the White House might urge them to submit additional names, which include minority or female counsel.⁷⁷ Obama requested that officers aggressively seek out, identify, and tender qualified diverse candidates,⁷⁸ although he may reiterate this suggestion more directly or forcefully, especially as to persons of color. The new chief executive, as his predecessors, has selected diverse judges and individuals whom the opposite party appointed or supports, but Obama might refine or expand these notions with elevation of additional minority and female trial court judges whom Bush appointed or nomination of GOP lawyers. He could redouble initiatives by sending

73. He has not announced the goals in a national venue. That enhances transparency and informs selection officials and the public. Tobias, *supra* note 62, at 1049. Obama may solicit advice of former selection officials. *Id.* at 1051.

74. *Supra* text accompanying notes 26–42. Obama has worked with Leahy and Reid, who schedule and negotiate with the GOP.

75. *See supra* text accompanying notes 43–53.

76. *See* Goldman, *supra* note 3 (offering the records of Presidents since Nixon).

77. The two senators from Maryland, New Jersey, Rhode Island and Virginia senators each proposed one name, but each candidate was diverse. *See supra* notes 29, 46, 52 and accompanying text.

78. For prior requests as to women, see Tobias, *supra* note 12, at 479; see also 156 CONG. REC. S513 (daily ed. Jan. 20, 2010); 155 CONG. REC. S11,282 (daily ed. Nov. 9, 2009).

even more able people of color and women faster.⁷⁹ Illustrative of fruitful solutions used by earlier administrations is President Carter's deployment of a Circuit Judge Nominating Commission and encouragement of senators to rely on District Judge Nominating Commissions.⁸⁰ A related, productive strategy may be passing a thorough judgeships law that would establish 63 appellate and district positions, which could increase the numbers of minority and female jurists.⁸¹

Obama has emphasized conciliatory avenues. If they lack efficacy because the GOP does not cooperate, he ought to analyze more confrontational techniques. For instance, should Republicans persist in stalling panel, and stopping floor, action, Obama might deploy the bully pulpit to embarrass or criticize them; force the question by taking it to the people; or make selection an election issue, a tactic the GOP has practiced.⁸² Analogous are nominations for all current vacancies or the selective use of recess appointments; both strategies leverage the opposition by publicizing or dramatizing how lengthy vacancies undercut justice.⁸³

B. The Senate

The Senate has been the principal roadblock for expeditious confirmation of many talented, diverse judges.⁸⁴ Republicans need to stop

79. Yet, affording more than the Senate can process may yield little benefit and could waste scarce resources or even be futile, so Obama must keep steadily tapping able, diverse nominees and perhaps accelerate submission.

80. See *supra* notes 4–5 and accompanying text.

81. The courts' policymaking arm, which bases proposals on conservative estimates of case and work loads, found that growing dockets required the seats. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 22, Mar. 17, 2009, <http://www.uscourts.gov/judconf/09-Mar.pdf>; see S.1653, 111th Cong. (2009); John G. Roberts, Jr., *2009 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Office of Pub. Affairs, Washington, D.C.), Jan. 1, 2010, available at <http://www.uscourts.gov/ttb/2010-01/index.cfm>. New seats will have no impact if the Senate cannot approve judges.

82. E.g., David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1902–06 (2008); Tobias, *supra* note 51, at 772.

83. The latter device raises so many issues that recess appointments are rare. U.S. CONST. art. II, § 2, cl. 3; see *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); William Mayton, *Recess Appointments and an Independent Judiciary*, 20 like CONST. COMM. 515 (2004).

84. The GOP should remember that when it held the Executive Branch, Senate Democrats approved more jurists; therefore citizens may blame Republicans for any problems created by the vacancies. Tobias, *supra* note 51, at 756; Jack Newfield, *The Right's Judicial Juggernaut*, THE NATION, Oct. 7, 2002, at 11, 11, 14, available at <http://www.thenation.com/doc/20021007/newfield>. But see Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL'Y 1035 (2009).

employing measures that obstruct their appointment and instead use conciliatory approaches.⁸⁵ Panel review has not substantially delayed confirmation. If that materializes, senators have numerous ways to expedite the process.⁸⁶ Most critically, the GOP should eschew or drastically restrict automatically holding over votes without reasons. The dearth of floor action best explains the few confirmations.⁸⁷ Individual senators must terminate or severely limit regular invocation of the unanimous consent stricture to delay floor action, particularly for noncontroversial individuals. The Minority Leader similarly needs to end or cabin his uncooperative behavior, mainly ignoring time accords. These practices dramatically slow the process and may necessitate cloture petitions. If the minority adopts filibusters or continues using its equivalent with anonymous holds, Democrats could revive notions, like the “Gang of 14,” which confine these devices’ application.⁸⁸

Finally, senators must confront the question of ideology and approve highly competent, diverse nominees. Both parties should generally deemphasize it, as Obama has. Membership in, or representation of, entities, including the ACLU and the Federalist Society, or publication of a few decisions that legislators oppose or higher courts reverse must not be litmus tests for selection or confirmation.⁸⁹ Article II contemplates that members will investigate ability, character, and temperament,⁹⁰ but

85. They should offer candid, informative advice when consulted; swiftly approve able, consensus prospects, including Bush appointees, whom Obama may elevate; and tender superior candidates when his are not acceptable.

86. They may increase hearings and votes with terse analysis or end pro forma sessions for uncontroversial counsel. Helen Dewar, *Republicans Push Speedy Action on Court Picks; Partisan Acrimony Marks Senate Panel’s Hearing on Judicial Nominations*, WASH. POST, Jan. 30, 2003, at A7; see also Tobias, *supra* note 51, at 766, 774.

87. Reid should arrange floor scrutiny soon after panel approval and afford more debates and votes, mainly as filibuster substitutes, for controversial nominees. Some debates are frank, helpful exchanges. 148 CONG. REC. S7651 (daily ed. July 31, 2002) (Judge Brooks Smith); 143 CONG. REC. S2515 (daily ed. Mar. 19, 1997) (Judge Merrick Garland).

88. *Compromise in the Senate: Text of Senate Compromise on Nominations of Judges*, N.Y. TIMES, May 24, 2005, at A18, <http://www.nytimes.com/2005/05/24/politics/24text.html>; see David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1076 (2008) (book review).

89. Overemphasizing ideology is as futile as the attempt to detect whether Bush and Clinton prospects would be “judicial activists.” E.g., *Should Ideology Matter?: Judicial Nominations 2001, Hearings Before the S. Judiciary Subcomm. on Admin. Oversight & the Courts*, June 26, 2001, S Hrg. 107–463, 107th Cong. 463 (2001) [hereinafter 2001 Hearings]; see KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 2–3* (2006). Criticism of Davis and Hamilton for a few rulings that senators oppose and of Chen for ACLU representation undervalues the district judges’ long, respected service and Chen’s Magistrate Judge record.

90. E.g., 2001 Hearings, *supra* note 89; Douglas Laycock, Op-Ed., *Forging Ideological Compromise*, N.Y. TIMES, Sept. 18, 2002, at A31; see Stephen L. Carter, *A Devilish Look at the Confirmation Process (With Apologies to C.S. Lewis)*, 50 DRAKE L. REV. 369 (2002).

lawmakers ought to avoid delaying or rejecting nominees based on how they could address substantive issues because this might erode judicial independence.⁹¹ Venerable norms and much recent practice suggest that nominees deserve hearings and votes.⁹²

CONCLUSION

President Obama has adopted special efforts to increase ethnic and gender diversity while nominating and appointing many talented persons of color and women—yet approval has proceeded less quickly than is optimal. He should facilitate the nomination of additional, capable minority and female attorneys, and individual senators must be receptive to those overtures and cooperate with the Administration and their colleagues. The Judiciary panel should continue expeditiously investigating, affording hearings for, and voting on nominees. Reid ought to promptly schedule floor debates and ballots. The GOP must eliminate or restrict devices that obstruct and stall the process. Should Republicans persist in blocking or slowing appointments, Democrats might employ cloture or related practices that will lead to greater floor action. Were the GOP to obstruct or stymie floor consideration, Obama may invoke less conciliatory approaches, such as his bully pulpit. If the parties work together, Obama and the Senate can fill the bench with qualified, diverse judges.

91. CITIZENS FOR INDEPENDENT COURTS, UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS 1–75, 121–71 (2000); Symposium, *Judicial Independence and Accountability*, 72 S. CAL. L. REV. 315 (1999). This seemed to occur in the confirmation processes for the last three Justices. *E.g.*, Hatch, *supra* note 84, at 1041.

92. *See* Tobias, *supra* note 51, at 764–65, 774–75. *See generally* Michael J. Gerhardt, *Merit vs. Ideology*, 26 CARDOZO L. REV. 353 (2005); Hatch, *supra* note 84, at 1039.