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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.


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 confirmable 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.\(^9\)
Once Ronald Reagan captured the presidency in 1980, he argued that the election was a mandate to increase conservatism on the judiciary. Reagan selected and confirmed many appellate and district jurists with ideologically conservative perspectives. He appointed practically no minorities and few women. When President George H. W. Bush secured election during 1988, he essentially followed Reagan’s selection philosophy and deployed analogous practices. 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. He wrote the Democratic senators urging them to propose very capable minority and female attorneys. 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.

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. Nonetheless, when Bush proposed lawyers whom Democrats opposed as too conservative, even invoking filibusters, this stymied appointments. Charges, retorts, and paybacks vexed.

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.
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).
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

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

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.). The panel swiftly processed nominees, yet few secured hearings before the August 7 recess. 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.


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 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”).

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. 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. 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. Persons of color and women, such as Judges Andre Davis and Beverly Martin, waited months to have floor votes. 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,” embracing the “empathy standard” and “the idea of a living Constitution;” asserted that Davis “has been reversed quite a number of times;” and doubted Chen would be a neutral umpire. He summarized these ideas: “I think we’re seeing a common DNA run through the Obama nominees, and that’s the ACLU chromosome.”

Even had Democrats invoked cloture to force earlier

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29. Koons, supra note 21; Alex Leary, Supreme Court Seat Not Only One Empty, ST. PETERSBURG TIMES, Aug. 6, 2009, at 1A.
35. Id. at S10,754.
36. Id.
votes, the GOP would have secured 30 hours of debate, thus consuming precious floor time.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. The Senate confirmed Judge Sotomayor to replace Justice David Souter, who retired, giving prompt evaluation top priority. Clinton appointed to the district bench ten very competent Obama appellate nominees. Eleven district prospects are Magistrate Judges and thirteen are state jurists.

2. Diversity

Obama has emphasized diversity. 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


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.


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


\(^{45}\) 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.


\(^{47}\) DOJ OLP, supra note 26; see Goldman, supra note 3 (offering Presidents’ records since Nixon).

\(^{48}\) DOJ OLP, supra note 26.


\(^{50}\) See supra notes 41–42.


\(^{52}\) 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.\footnote{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,\footnote{54} and hold different, valuable perspectives in discrete fields, such as criminal procedure and employment law,\footnote{55} although a recent evaluation of female judges found little evidence of difference between women and men.\footnote{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.\footnote{57} Insofar as they do, he could justify this because Republicans appointed conservatives and majorities to numerous circuits,\footnote{58} and Obama has deemphasized ideology.\footnote{59} Persons of color and women may also help limit the racial,\footnote{53}.

\begin{footnotes}
\footnotetext{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.}
\footnotetext{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.}
\footnotetext{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).}
\footnotetext{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=wheeler; Goldman, supra note 3, at 6–8. Thus, his electoral success was ostensibly a mandate to restore balance.}
\footnotetext{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. A bench whose composition essentially reflects America instills greater public confidence. Expanding diversity also illustrates the Administration’s commitment to enhancing conditions for minorities and women across the profession, the justice system, and the nation.

B. Critical Analysis

Most striking is how Obama eclipsed his predecessors vis-à-vis early, diverse nominations, but only eleven people of color and ten women have been appointed. 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. Obama’s aides quickly instituted many actions to help choose the nominee, familiarize the Senate and the public with Judge Sotomayor, and assist her preparation. The chamber and the panel


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 Rogerere 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.


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,

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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.


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.


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-admin istration.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. 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. Obama has improved diversity with the endeavors scrutinized, namely contacting minority and female legislators, tapping prospects whom the GOP favors, and elevating judges. The initiatives have been fruitful and set records for nominating and appointing talented, diverse lawyers at this early juncture in a new Administration. 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. Obama requested that officers aggressively seek out, identify, and tender qualified diverse candidates, 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. 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. 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.

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. 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.

B. The Senate

The Senate has been the principal roadblock for expeditious confirmation of many talented, diverse judges. 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.


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).


employing measures that obstruct their appointment and instead use conciliatory approaches. Panel review has not substantially delayed confirmation. If that materializes, senators have numerous ways to expedite the process. 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. 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.

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. Article II contemplates that members will investigate ability, character, and temperament, 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).


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

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.


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.