

HOW POLITICAL IDEOLOGY UNDERMINES RACIAL AND GENDER DIVERSITY IN FEDERAL JUDICIAL SELECTION: THE PROSPECTS FOR DIVERSITY IN THE TRUMP YEARS

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This Essay considers the relationship between efforts to increase the racial and gender diversity of the federal judiciary and the contemporary contentiousness of the Senate judicial confirmation process. Part I briefly evaluates the benefits of a diverse federal judiciary and summarizes the relatively successful efforts of President Obama—the nation’s first African-American president—to increase racial and gender diversity among the nation’s federal judges. Part II analyzes the diversity costs of an ideologically-driven confirmation process in the United States Senate. Part III suggests that President Trump’s suspicions that racial minorities are naturally biased do not bode well in terms of his commitment to diversity.

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INTRODUCTION

The process for the nomination and confirmation of federal judges has long been a topic of considerable commentary and controversy.¹ That almost unquestionably will continue to be the case during the

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1. See, e.g., Symposium, *Federal Judicial Selection in the New Millennium*, 36 U.C. DAVIS L. REV. 583 (2003).

Trump Administration, with the new president coming to power following a turbulent presidential campaign in which the composition of the Supreme Court was a central issue of divergence between the candidates.²

Over the past few decades, partisan politics have contributed to a virtual explosion of divisiveness in the Supreme Court selection process, the most high profile, high stakes stage for federal judicial selection. The growing backlog of judicial nominations demonstrates how the confirmation process has deteriorated in the modern era. When taking office, President Donald Trump had more than one hundred judicial vacancies to fill, nearly double the number of openings that President Barack Obama had when he became president.³

The title of one law review article—“Judicial Selection as War”—reveals much about the nature of the contentiousness of the modern federal judicial selection process.⁴ The character of the conflict is not new. More than two decades ago, Stephen Carter wrote a bit more gently of “the confirmation mess.”⁵

The record-long Senate inaction on President Obama’s nomination of distinguished court of appeals Judge Merrick Garland to the vacancy left by the untimely death of Justice Antonin Scalia is simply the latest chapter in a turbulent Supreme Court confirmation process.⁶ The tumultuous hearings that surrounded Robert Bork and Clarence Thomas, both conservatives nominated by Republican presidents, also stand as milestones in the contemporary history of contentious Supreme Court confirmation battles.⁷

2. See *infra* Part III.A.

3. See Philip Rucker & Robert Barnes, *Trump to Inherit More than 100 Court Vacancies, Plans to Reshape Judiciary*, WASH. POST (Dec. 25, 2016), https://www.washingtonpost.com/politics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d_story.html [https://perma.cc/QQ68-ATCS].

4. Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667 (2003).

5. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994) (analyzing the dysfunction of the modern federal appointments process). For analysis of the history of the political nature of the judicial confirmation process, see LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005).

6. See Carl Hulse, *A Supreme Court Stonewall May Not Crumble Anytime Soon*, N.Y. TIMES, Nov. 4, 2016, at A19; see also Carl Tobias, *Filling Federal Court Vacancies in a Presidential Election Year*, 50 U. RICH. L. REV. 1233, 1234–48, 1260 (2016) (reviewing contemporary federal judicial selection process, including the nomination of Judge Merrick Garland to the Supreme Court).

7. See MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NOMINATION TO THE SUPREME COURT* (1992); TIMOTHY M. PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION* (1992).

Political divisiveness in the confirmation process based on ideological differences in a deeply polarized United States Senate likely will continue to afflict federal judicial selection and confirmations for the foreseeable future.⁸ Such tensions will almost certainly have lasting reverberations on another important concern that figures prominently in federal judicial selection in the modern era, as well as in all major institutions in modern American society—the overall racial and gender diversity of the federal judiciary.

Efforts to diversify the federal judiciary—and transform the federal courts away from being exclusively the domain of white men—began in earnest with the modern civil rights movement. In 1967, President Lyndon Johnson nominated the first African-American Justice, Thurgood Marshall, to the Supreme Court.⁹ That path-breaking nomination represented a critically important step toward full inclusion of African Americans in American social life. For years, Supreme Court watchers mulled over the possibility and ramifications of the appointment of the first Latina/o Justice.¹⁰ President Obama ultimately nominated, and the Senate confirmed, Sonia Sotomayor as the first Latina Justice—and the first woman of color—on the nation’s highest Court.¹¹ Given the dramatic increase in the Asian American population

Analysis of the Senate’s responsibility to confirm Justices to the Supreme Court can be found in LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* (1985); Wm. Grayson Lambert, Note, *The Real Debate Over the Senate’s Role in the Confirmation Process*, 61 *DUKE L.J.* 1283 (2012).

8. See Hulse, *supra* note 6 (reporting that, having successfully blocked the nomination of court of appeals Judge Merrick Garland, Republican senators were considering the possibility of refusing to confirm *any* Supreme Court nominations if Hillary Clinton were elected president). The appropriate place of political ideology in judicial selection and Senate confirmation was analyzed in Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 *U.C. DAVIS L. REV.* 619 (2003); John C. Eastman, *The Limited Nature of the Senate’s Advice and Consent Role*, 36 *U.C. DAVIS L. REV.* 633 (2003). At the time that those articles were written, Republican George W. Bush was president, which may have influenced the analysis of the degree of deference properly afforded to presidential nominations. A defense of ideological litmus tests in judicial confirmations can be found in Michael Stokes Paulsen, *The Constitutional Propriety of Ideological “Litmus Tests” for Judicial Appointments*, 83 *U. CHI. L. REV. ONLINE* 28 (2016).

9. See generally JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (1998). President Johnson nominated Thurgood Marshall only weeks before riots and civil disorder, connected to African-American protest and discontent, embroiled American cities from coast to coast. See Charles Sumner Stone, Jr., *Thucydides Law of History, or from Kerner, 1968 to Hacker, 1992*, 71 *N.C. L. REV.* 1711, 1718 (1993).

10. See, e.g., Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 13 *LA RAZA L.J.* 1 (2002).

11. See Kevin R. Johnson, *An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The Assimilation Demand at Work*, 30 *CHICANA/O-LATINA/O L. REV.* 97 (2011) (analyzing critically how race shaped

in the United States over the last fifty years, one would expect the nation to see the nomination of the first Asian American Justice to the Supreme Court in the not-too-distant future.¹²

Although appointments to the Supreme Court receive the most public attention and political scrutiny, the vast majority of federal judges hear cases at the district court and court of appeals levels. The lower courts handle most of the federal judicial business. Indeed, recent years have seen a significant decline in the number of cases accepted for review by the Supreme Court.¹³ Similar to the high Court, the lower federal courts have slowly become more diverse—racially and gender-wise—in the modern era.¹⁴

Many observers would agree that continuing the efforts to increase racial and gender diversity on the federal bench—as well as in all of American society—is a laudable social goal.¹⁵ Such diversity, among other things, enhances the perceived legitimacy and representativeness of the federal justice system.¹⁶ Today, the presence of judges who in the

Justice Sotomayor's nomination and confirmation process); *see also* Amber Fricke & Angela Onwuachi-Willig, *Do Female "Firsts" Still Matter? Why They Do for Female Judges of Color*, 2012 MICH. ST. L. REV. 1529 (reviewing the importance of increasing the number of women of color as judges).

12. *See* Amy Goldstein, *Will the U.S. Supreme Court Get Its First Asian American Justice?*, WASH. POST (Mar. 11, 2016), https://www.washingtonpost.com/politics/courts_law/will-the-us-supreme-court-get-its-first-asian-american-justice/2016/03/11/09039124-e6f7-11e5-bc08-3e03a5b41910_story.html [<https://perma.cc/2LBG-4W2D>] (discussing the possible nomination by President Obama of the first Asian American to the Supreme Court); *see also* Josh Hsu, *Asian American Judges: Identity, Their Narratives, & Diversity on the Bench*, 11 UCLA ASIAN PAC. AM. L.J. 92 (2006) (analyzing the impact of Asian American jurists); Sudhin Thanawala, *Few Asian-Americans Hold Top Legal Jobs, New Study Finds*, ASSOCIATED PRESS (Jan. 15, 2017, 4:44 PM), <http://bigstory.ap.org/article/9ecb9ea0d0654826b7c6c08d8bcefc61/few-asian-americans-hold-top-legal-jobs-new-study-says> [<https://perma.cc/2QJH-D8BK>] (reporting on a study finding that Asian Americans are underrepresented in the judiciary and other high posts).

13. *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1364 (2006); Erwin Chemerinsky, *The Incredible Shrinking Docket*, TRIAL MAG., Mar. 2007, at 64.

14. *See infra* notes 20–23 and accompanying text and Part I.B.

15. *See, e.g.*, Theresa M. Beiner, *The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 598, 614 (2003). Analysis of the benefits to diversity in the legal system generally can be found in Jenny Rivera, *Diversity and the Law*, 44 HOFSTRA L. REV. 1271 (2016). Rivera serves as a justice on the Court of Appeals of New York.

16. *See* Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 28–30 (2004).

aggregate mirror society positively shapes popular perceptions about the legitimacy of the American courts.¹⁷

Generally speaking, efforts to increase the diversity of the federal bench in the contemporary era fail to generate the deep political divisions that ideological differences do. One would expect a nominee's views on abortion, affirmative action, or gun control, to offer a few modern examples, to be a much greater source of contention in modern times than a nominee's racial ancestry or gender. However, in light of the differing ideological tilts of the two major political parties in the United States, one might predict that Republican and Democratic presidents would place different weights on the relative importance of diversity in judicial selection. Consistent with that intuition, President Obama, a Democrat, nominated judges who have added racial and gender diversity to the federal bench.¹⁸ That includes the appointment of the first woman of color to the Supreme Court as well as another woman, Elena Kagan.¹⁹

Despite the increases in diversity in judicial selection in recent years, considerable work remains to be done to more fully diversify the federal judiciary. Although slowly increasing over time, the number of judges from diverse backgrounds is far from what one might hope given the nation's increasingly diverse population.²⁰ The federal courts continue to have relatively few African-American, Latina/o, Asian-American, and Native-American judges.²¹ "The data . . . show that men—and [w]hite men especially—have historically dominated and continue to dominate the federal judiciary."²² Moreover,

[R]ecent figures for the federal bench show[] that of the active federal judges on the courts (including bankruptcy and

17. See *infra* Part I.A.

18. See Carl Tobias, *Considering Lesbian, Gay, Transgender, and Bisexual Nominees for the Federal Courts*, 90 WASH. U. L. REV. 577, 577–81 (2012); Ed Beeson, *Broadening the Bench: How Obama's Push for Diversity is Reshaping the Courts*, LAW 360 (Oct. 17, 2016, 7:11 P.M.), <http://www.law360.com/articles/851614/how-obama-s-push-for-diversity-is-reshaping-the-courts> [<https://perma.cc/U8WC-XF3S>]; *infra* Part I.B.

19. See Paul Kane & Robert Barnes, *Senate Confirms Kagan as Justice*, WASH. POST, Aug. 6, 2010, at A01.

20. See Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789-2016*, 26 BERKELEY LA RAZA L.J. 92, 106–13 (2016) (reviewing data on the history of diversity of judicial appointments and identifying Jimmy Carter as one of the first presidents to make significant strides in nominating women and minority federal judges).

21. See *id.* at 117 (Table 3).

22. *Id.* at 113; see Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109 (2003) (lamenting the lack of racial diversity among federal judges).

magistrate judges), 6.8% are African American, 5.3% are Hispanic, and 1.1% are Asian American. Only 26% of the active appellate judges are women; and only 25% of district court judges are women.²³

There is reason to believe that President Trump will not make increasing diversity on the federal bench, including the Supreme Court, a top priority in judicial nominations as President Obama did. Rather, judging from the two lists of possible nominees to the Supreme Court that Trump released during the presidential campaign,²⁴ a commitment to a tried-and-true conservative judicial philosophy will most likely be the touchstone of the Trump Administration's judicial appointments. Such an approach long has been a staple of Republican presidents, at least since Richard Nixon campaigned for president in 1968 against what he alleged was the ultra-liberal decisions of the Warren Court—especially on school segregation (and busing as a remedy to segregation) and criminal procedure matters.²⁵ Ironically enough, that Court was led by Chief Justice Earl Warren, who was appointed by Republican President Dwight Eisenhower.

Those interested in increasing the diversity of the federal judiciary might wonder about the intersection of racial and gender diversity and political ideology in the judicial nomination and confirmation process. One might opine that, as a matter of practical politics, more conservative minority justices would have an easier road to Senate confirmation than more liberal ones, who might be expected to face grueling challenges to their political ideology.²⁶ With a relatively conservative minority or woman nominee, senators of both political parties might find something attractive. That, of course, has not always been the case. Conservative African American Clarence Thomas, for example, faced a famously tumultuous confirmation process.²⁷ That,

23. Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2D 45, 46 (2009) (footnote omitted).

24. See *infra* Part III.A.

25. See JAMES F. SIMON, IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA 3-4, 8 (1973); see also BOB WOODWARD & SCOTT ARMSTRONG, THE BROTHERS 10 (1979) (noting that Republican presidential nominee, and ultimately President, Richard Nixon emphasized repeatedly during the campaign that he was "running against [Chief Justice] Warren and his Court as much as he was running against his Democratic rival, Senator Hubert Humphrey").

26. See Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1442-48 (2008) (noting that the Bush administration made this precise political calculation).

27. See Neil A. Lewis, *High Court Nominee Faces Easy Road Through Senate*, N.Y. TIMES (July 20, 1993), <http://www.nytimes.com/1993/07/20/us/high-court-nominee-faces-easy-road-through-senate.html> [<https://perma.cc/KC7Q-L7S2>].

however, appears to have resulted largely from the serious—and sensational—allegations of personal misconduct leveled against him.²⁸

Building on the work of, among others, Sylvia Lazos,²⁹ this Essay analyzes the confluence of racial and gender diversity and political ideology in the modern federal judicial selection and confirmation process. It contends that ideological litmus tests routinely applied with vigor by Republican presidents and senators politicize—and polarize—the confirmation process and have created a significant barrier to diversifying the federal judiciary. A less politically and ideologically divisive climate in the Senate—and Congress and the nation as a whole—likely would facilitate increasing the racial and gender diversity of the federal bench. This Essay concludes by considering the possible adverse consequences of a Trump presidency on the diversity of federal court judges.³⁰

Part I of the Essay looks briefly at the benefits of a diverse federal judiciary and outlines the conscious, and relatively successful, efforts of President Obama, the nation's first African-American president, to increase racial and gender diversity. Part II analyzes the diversity costs of an ideologically-driven and contentious confirmation process in the United States Senate. Finally, Part III considers President Trump's likely commitment (or lack thereof) to diversity in his federal judicial appointments.

I. THE BENEFITS OF DIVERSE VOICES AND PRESIDENT OBAMA'S RECORD

As is the case for other institutions in modern American society, diversity in the federal judiciary is generally considered to be a positive.³¹ In his judicial nominations, President Obama actively sought to bring greater racial and gender diversity to the federal bench.

A. Diversity and Excellence

Diversity among the corps of federal judges has both tangible and intangible benefits. Diversity has generally been considered to increase the perceived legitimacy of the judiciary in the eyes of the public.³² Put

28. See generally PHELPS & WINTERNITZ, *supra* note 7 (documenting the firestorm of controversy surrounding Justice Clarence Thomas's nomination and confirmation marked by the explosive charges of sexual harassment levelled against him by law professor Anita Hill).

29. See Lazos Vargas, *supra* note 26.

30. See *infra* Part III.

31. See Johnson & Fuentes-Rohwer, *supra* note 16, at 28.

32. See *id.* at 28–30. For examination of the relationship between diversity and legitimacy in federal judicial selection, see Nancy Scherer, *Diversifying the Federal*

differently, an all-white judiciary in most quarters will not be viewed as legitimate, just as an all-white jury deciding a case involving an African-American criminal defendant is not viewed as legitimate.³³ A diverse judiciary reflecting a cross-section of the greater community, resembling the cross-section from which petit juries must be selected, generally will be considered to be more legitimate than a homogenous bench.³⁴

Enhanced legitimacy of—as well as greater minority representation in—an all-important American institution helps explain President Obama's efforts to appoint a diverse group of federal judges.³⁵ Legitimacy and representation are especially important in times when claims of law enforcement abuses of minority communities regularly make the national news.³⁶

Besides perceptions of legitimacy and better representation of the nation as a whole, minority and women judges may bring different perspectives—some might characterize them as different “voices”—to bear on the courts' decisions and improve the general quality of judicial decision-making.³⁷ Thurgood Marshall surely brought a distinctive perspective and set of experiences and values to the Supreme Court.³⁸ The second African-American Justice, Clarence Thomas, does as well, even though his ideology is very different from Justice Marshall's and is rooted in southern Black conservative thought.³⁹ From all

Bench: Is Universal Legitimacy for the U.S. Justice System Possible?, 105 NW. U. L. REV. 587 (2011). For a critical response, see Carl Tobias, *Justifying Diversity in the Federal Judiciary*, 106 NW. U. L. REV. COLLOQUY 283 (2012).

33. See Johnson & Fuentes-Rohwer, *supra* note 16, at 33–39, 44–45.

34. See *id.* at 33–36.

35. See *infra* Part I.B.

36. See, e.g., U.S. DEP'T JUST., CIV. RTS. DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://permanent.access.gpo.gov/gpo55760/ferguson_police_department_report.pdf [<https://perma.cc/ZZ4E-V6FP>] (reporting on the investigation of the police killing of an African-American man in Ferguson, Missouri). See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2d ed. 2012) (analyzing critically the adverse impacts of the modern criminal justice system on African Americans).

37. See Johnson & Fuentes-Rohwer, *supra* note 16, at 11–22, 26–27; Lazos Vargas, *supra* note 26, at 1432–35; see also Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 112–18 (1997) (analyzing the perceived tension between minority representation and bias among minority judges).

38. See Anthony M. Kennedy, *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221, 1222–23 (1992); Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 726–28 (1992); Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1218 (1992).

39. See Angela Onwuachi-Willig, *Just Another Brother on the SCT: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L.

appearances, the first Latina Justice, Sonia Sotomayor, has brought a unique set of perspectives to the Court and its decision-making.⁴⁰ Along these lines, research demonstrates that the race of a judge may affect the ways that he or she decides cases.⁴¹

B. President Obama's Judicial Selections

“Because there are so many other competing political goals and values, in order for diversification [of the federal judiciary] to actually happen it clearly has to be a President’s priority.”⁴² In contrast to the Bush Administration,⁴³ the Obama Administration understood the benefits of diversity in the judiciary and consciously sought to nominate a diverse group of federal judges. That approach is consistent with the intentionality employed by businesses, universities, and other institutions seeking to bring greater diversity to hiring, admissions, and other decisions.⁴⁴ The perceived value added by diversity is demonstrated by the fact that large institutions today routinely seek the advice of diversity consultants.⁴⁵ Although important, diversity planning

REV. 931 (2005) (analyzing Justice Thomas’s opinions and finding them to be firmly rooted in Southern Black conservative thought).

40. See *infra* notes 48–53 and accompanying text.

41. See Stubbs, *supra* note 20, at 113–25 (reviewing research on the effects of the race of judges on judicial decision-making); see, e.g., Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009); Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs’ Race and Judges’ Race*, 28 HARV. J. RACIAL & ETHNIC JUST. 91 (2012).

42. Lazos Vargas, *supra* note 26, at 1439.

43. See Carl Tobias, *Diversity and the Federal Bench*, 87 WASH. U. L. REV. 1197, 1200 (2016) (stating that President George W. “Bush named many conservatives and numerous women but relatively few minorities” to the federal court bench) (footnote citing, inter alia, Jennifer Diascro & Rorie Solberg, *George W. Bush’s Legacy on the Federal Bench*, 92 JUDICATURE 289 (2009)). Although President Bush appointed more minorities than any other Republican president, the appointees were ideologically conservative. See Lazos Vargas, *supra* note 26, at 1442–48.

44. See, e.g., *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (upholding University of Texas’ race-conscious affirmative action program for student admissions); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (same for race-conscious admissions program at the University of Michigan Law School) see also Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective*, 96 IOWA L. REV. 1549 (2011) (contending that student and faculty diversity is important to evaluating the quality of law schools).

45. See Pam Jenoff, *The Case for Candor: Application of the Self-Critical Analysis Privilege to Corporate Diversity Initiatives*, 76 BROOK. L. REV. 569, 570–71 (2011) (discussing the use of diversity consultants by businesses to evaluate workplace climate issues); Peter Schmidt, *Demand Surges for Diversity Consultants*, CHRON. HIGHER EDUC. (May 15, 2016), <http://www.chronicle.com/article/Demand-Surges-for-Diversity/236442> [<https://perma.cc/6GPE-BT4K>] (noting that universities regularly

is difficult in a political process, with many individuals and institutions participating in the nomination and confirmation of judges, competing values coming into play in judicial appointments, regular changes in the nation's political leadership (through election of the president as well as senators), and numerous other shifting variables.

President Obama shared the conventional wisdom that diversity enhances the legitimacy and representation of the federal judiciary and brings distinct perspectives to the process of judging. Consequently, he consciously made appointments that increased the diversity of federal judges:

President Barack Obama . . . established a pattern of making more demographically diverse appointments than any of his predecessors. As of April 11, 2016, Obama [had] appointed, and the Senate [had] confirmed, 316 persons to the federal bench. Of these, 118 are White males, 88 are White females, 34 are African-American males, 26 are African-American females, 9 are Asian-American females, 11 are Asian-American males, 13 are Latinas, and 23 are Latinos. In addition, on April 23, 2013, Derrick Kahala Watson became the first Pacific Islander to receive a commission as a federal judge of general jurisdiction. Obama also nominated, and on May 14, 2014, the Senate confirmed, Diane J. Humetewa, the first Native American woman to serve as judge of a federal court of general jurisdiction. Obama's female judicial appointees comprise 42 percent of his appointments—a significantly higher percentage of women than any of his predecessors.⁴⁶

Consistent with a record of diversity in judicial nominations, President Obama, near the end of his second term, nominated the first Muslim to the federal bench.⁴⁷

Perhaps the most visible appointment by the Obama Administration that added diversity to the federal courts was the nomination of Sonia Sotomayor, the first Latina justice on the Supreme Court.⁴⁸ She unquestionably has had a discernible impact on the Court. For example, Justice Sotomayor penned an opinion early on in her

retain diversity consultants for advice on the best practices for achieving diversity and inclusion).

46. Stubbs, *supra* note 20, at 108 (emphasis added) (citations omitted).

47. See Henry Gass, *Obama Nominates Muslim Judge: Does Diversity Matter to Justice?*, CHRISTIAN SCI. MONITOR (Sept. 7, 2016), <http://www.csmonitor.com/USA/Justice/2016/0907/Obama-nominates-Muslim-judge-Does-diversity-matter-to-justice> [<https://perma.cc/X2CH-KG9P>].

48. See *supra* note 11 and accompanying text.

tenure employing the term “undocumented immigrants” rather than “illegal immigrants,” a seemingly small but meaningful statement about the basic humanity of the people affected by the operation of the United States immigration laws.⁴⁹ Latina/os long have had special interest in the United States immigration laws and their enforcement. “Justice Sotomayor’s opinion in the case . . . marked the first use of the term ‘undocumented immigrant’ [in a Supreme Court opinion]. . . . The term ‘illegal immigrant’ has appeared in a dozen decisions.”⁵⁰ She also has been willing to forthrightly criticize the excesses of law enforcement agencies.⁵¹ Still, Sotomayor felt pressure in the confirmation process to assimilate into the mainstream in her responses to questions from the Senators and faced exacting scrutiny for potential bias because of her statements touching on the possible positive attributes of Latina identity in a judge.⁵² Her remarks at a conference at UC Berkeley School of Law about the unique perspectives of a “wise Latina” generated a great deal of controversy, commentary, and questioning during her Senate confirmation hearings.⁵³

49. See *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 103 (2009); see also Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J. F. 499 (2014) (analyzing Justice Sotomayor’s immigration decisions); Lauren Gilbert, *The 26th Mile: Empathy and the Immigration Decisions of Justice Sotomayor*, 13 HARV. LATINO L. REV. 1 (2010) (to the same effect). Terminology is critically important in framing the discussion of U.S. immigration law and its enforcement. See Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263 (1996) (analyzing how the term “alien” to refer to noncitizens tends to deny them personhood and legitimizes their harsh treatment under the law); see also D. Carolina Nuñez, *War of the Worlds: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517 (analyzing contrasting connotations of “alien,” “immigrant,” and “citizen”).

50. Adam Liptak, *Sotomayor Draws Retort from a Fellow Justice*, N.Y. TIMES, Dec. 9, 2009, at A24.

51. See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2064 (2016) (Sotomayor, J., dissenting) (disagreeing with a majority of the Court that the Fourth Amendment was not violated by an unconstitutional investigatory stop that ultimately led to an arrest and criminal conviction); *Mullenix v. Luna*, 136 S. Ct. 305, 313 (2015) (Sotomayor, J., dissenting) (“Chadrin Mullenix fired six rounds in the dark at a car travelling 85 miles per hour. He did so without any training in that tactic, against the wait order of his superior officer, and less than a second before the car hit spike strips deployed to stop it. Mullenix’s rogue conduct killed the driver, Israel Leija, Jr. Because it was clearly established under the Fourth Amendment that an officer in Mullenix’s position should not have fired the shots, I respectfully dissent from the grant of summary reversal [on qualified immunity grounds].”).

52. See generally Johnson, *supra* note 11 (analyzing critically Justice Sotomayor’s confirmation process).

53. See *id.* at 135–42. The remarks that sparked controversy can be found in Sonia Sotomayor, *A Latina Judge’s Voice*, 13 LA RAZA L.J. 87, 92 (2002) (“I would hope that a wise Latina woman with the richness of her experiences would more often

A number of President Obama's judicial nominations, including a number of women and minorities, were pending when the nation elected Donald Trump as President. The nominees ultimately went unconfirmed.⁵⁴ As we shall see,⁵⁵ President Trump appears to have a very different mindset than President Obama about the relative importance and positive value of diversity in judicial selection. Indeed, like many Republican presidents, he appears for political reasons to be laser-focused on the conservative ideology of his judicial nominees; in addition, contrary to the conventional view that diversity improves judicial decision-making and institutional legitimacy, President Trump has expressed serious reservations about how a minority background might contribute to bias in deciding cases.⁵⁶

II. THE DIVERSITY COSTS OF THE POLITICIZATION OF THE CONFIRMATION PROCESS

Diversity in the federal judicial selection process appears to be one of the most significant casualties of the overheated ideological tensions in Congress over judicial selection and confirmation. A number of reasons have been offered to explain why the judicial selection process and other factors adversely affect the diversity of the nominees.⁵⁷ Partisan politics, in my estimation, is one of the most salient factors today.

As Judge Merrick Garland's derailed nomination demonstrates, a moderate nominee to the Supreme Court with impeccable credentials can be held up by partisan political bickering and denied even a

than not reach a better conclusion than a white male who hasn't lived that life.") (emphasis added).

54. See Kevin Daley, *It's Not Just Garland — 50 Other Obama Judicial Nominees Lost Tuesday Too*, DAILY CALLER (Nov. 10, 2016, 12:47 PM), <http://dailycaller.com/2016/11/10/its-not-just-garland-50-other-obama-judicial-nominees-lost-tuesday-too/> [https://perma.cc/9AS7-WXKC]; see, e.g., Carl Tobias, *Confirm Judge Koh for the Ninth Circuit*, 73 WASH. & LEE L. REV. ONLINE 449, 450–81 (2016) <http://scholarlycommons.law.wlu.edu/wlulr-online/vol73/iss1/19/> [https://perma.cc/GER5-AMD4] (calling for the confirmation of an Asian American district court judge nominated by President Obama to the U.S. Court of Appeals for the Ninth Circuit).

55. See *infra* Part III.

56. See *infra* Part III.

57. See, e.g., Linda M. Merola & Jon B. Gould, *Navigating Judicial Selection: New Judges Speak About the Process and Its Impact on Judicial Diversity*, 93 JUDICATURE 184, 184–85 (2010); MALIA REDDICK ET AL., AM. JUDICATURE SOC'Y, EXAMINING DIVERSITY ON STATE COURTS: HOW DOES THE JUDICIAL SELECTION ENVIRONMENT ADVANCE—AND INHIBIT—JUDICIAL DIVERSITY? (2010), http://www.judicialselection.us/uploads/documents/Examining_Diversity_on_State_courts_2CA4D9DF458DD.pdf.

confirmation hearing as well as a Senate vote.⁵⁸ Obviously, if the Senate is not regularly confirming nominees, we cannot hope to see a significant increase in the diversity of the federal judiciary. As mentioned, a number of President Obama's judicial nominees from diverse backgrounds never had a hearing, much less a vote, on their nominations.⁵⁹

A look back at Thurgood Marshall's path-breaking confirmation as a Justice to the Supreme Court reveals just how much political times have changed over the last fifty years.⁶⁰ Although not without challenges to Marshall's qualifications and character, the Senate confirmed his appointment by a lop-sided 69-11 vote.⁶¹ One can only wonder whether Marshall could be confirmed in today's contentious political climate. One could reasonably envision a rancorous confirmation process if President Obama had nominated a person even remotely resembling Thurgood Marshall to the Supreme Court. A leader of the NAACP Legal Defense Fund, well-known for civil rights activism, would almost certainly undergo formidable challenges in modern times, even if he or she had the same basic credentials, experience (including as Solicitor General and court of appeals judge), and background as Thurgood Marshall.⁶²

A. Avoiding Political Controversy: Nominating Sitting Judges

As a political matter, judges who have judicial experience are less likely to undergo the challenges that other nominees are likely to face in the United States Senate.⁶³ Consequently, "there now exists a norm of prior judicial experience that induces a highly problematic level of career homogeneity on the [Supreme] Court."⁶⁴ The diversity consequences of limiting nominations to sitting judges can be profound; for example:

Since only eleven of the women and two of the minorities on the U.S. courts of appeals [at the time were] Republicans, if George W. Bush followed both the norms of experience and

58. See *supra* notes 6-7, 54 and accompanying text.

59. See *supra* note 54 and accompanying text.

60. See *supra* note 9 and accompanying text.

61. See Stephen L. Carter, *Thurgood Marshall: A Remembrance*, 47 OKLA. L. REV. 5, 7-8 (1994).

62. See WILLIAMS, *supra* note 9.

63. See Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903, 906 (2003).

64. *Id.* at 908.

of partisanship, he would be forced to draw from a very small pool of candidates comprising mostly Whites and males.⁶⁵

Sitting federal judges often are considered to be safer political bets for confirmation to higher courts and dominate the nominees to the Supreme Court in the modern era.⁶⁶ But, because minority and women judges are relatively few, a focus on sitting judges tends to dramatically reduce the racial diversity of the pool of potential nominees, especially for the Supreme Court.⁶⁷ The same is generally true for women.⁶⁸

Although color-blind, a sitting judge qualification serves to disproportionately exclude people of color from the Supreme Court and the court of appeals.⁶⁹ It also operates to exclude others with experiences in the private and public sectors who might add valuable perspectives missing from the current Court.⁷⁰ Consider that, as we shall see, Donald Trump's two lists of possible nominees to the Court released during the presidential campaign almost exclusively included sitting federal and state court judges; not surprisingly, especially when one considers that his focus appears to have been on bedrock conservative ideology in judicial selections, the potential nominees were not at all diverse, racially or gender-wise.⁷¹

As this suggests, ideological divisiveness, which tends to result in efforts in selecting sitting judges who reduce political controversy in the Senate confirmation process, effectively narrows the pool of potential Supreme Court nominees and makes for greater homogeneity in the pool.⁷² The direct result is a nominee like court of appeals Judge Merrick Garland, not Thomas Saenz, President and General Counsel of the Mexican American Legal Defense and Educational Fund.⁷³

65. *Id.* at 957.

66. *See id.* at 911.

67. *See supra* notes 63–66 and accompanying text.

68. *See* Epstein et al., *supra* note 63, at 908.

69. *See id.* at 941.

70. *See id.* at 954.

71. *See infra* Part III.A.

72. *See* Carl Tobias, *Judicial Selection at the Clinton Administration's End*, 19 L. & INEQ. 159, 160 (2001) (noting the political challenges to the efforts by President Clinton to appoint women and minority judges).

73. *See* Thomas A. Saenz: *President and General Counsel*, MEX. AM. LEGAL DEF. & EDUC. FUND, http://maldef.org/about/thomas_a_saenz/ [<https://perma.cc/C54F-DFQQ>] (last visited Mar. 12, 2017). President Obama initially decided to nominate Saenz to head the Civil Rights Division of the Justice Department, but Republican opposition to his positions on immigration ultimately derailed the nomination. *See* Gregory Rodriguez, *A Troubling Sign from Obama*, L.A. TIMES, Mar. 23, 2009, at A19 (criticizing President Obama's decision not to move forward the nomination of Saenz to head the Civil Rights Division of the U.S. Department of Justice); Keith Kamisugi, *Why Did the Obama Administration Renege on Its Offer to Tom Saenz?*, EQUAL JUST. SOC'Y (Mar. 16, 2009),

Similarly, in today's heated political climate, presidents are much less likely today than in years past to nominate prominent political leaders without judicial experience such as Chief Justice Earl Warren, the former Governor of California,⁷⁴ to the Supreme Court.

By way of contrast, the state of California has a much less politicized process for the confirmation of nominees to the state's highest court. With little controversy or resistance, Governor Jerry Brown has been able to appoint to the California Supreme Court a Latino (Mariano-Florentino Cuéllar), an Asian American (Goodwin Liu), and an African American (Leondra Krueger) in recent years.⁷⁵ None were sitting judges.⁷⁶ Two were law professors and the other an assistant to the United States Solicitor General who formerly held a

<https://equaljusticesociety.org/2009/03/16/why-did-the-obama-administration-renege-on-its-offer-to-tom-saenz/> [<https://perma.cc/8VMD-Y9AB>] (to the same effect).

74. See generally BERNARD SCHWARTZ, *SUPREME CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* (1983) (analyzing Chief Justice Earl Warren's tenure on the U.S. Supreme Court).

75. See Maura Dolan, *New California Supreme Court Surprises Analysts Early On*, L.A. TIMES (Apr. 26, 2015, 6:00 AM), <http://www.latimes.com/local/california/la-me-brown-court-20150426-story.html> [<https://perma.cc/3V3K-2ZVT>]; Dan Morain, *Brown Looks to History as He Builds a New High Court*, SACRAMENTO BEE (Dec. 27, 2014, 4:00 PM), <http://www.sacbee.com/opinion/opn-columns-blogs/dan-morain/article5055027.html> [<https://perma.cc/JD7D-RE57>]. Justices of the California Supreme Court are nominated by the governor and subject to confirmation by the Commission on Judicial Appointments, which consists of the state's chief justice, attorney general, and senior justice of the courts of appeals. CAL. CONST. art VI, § 16(c), (d)(1). California, however, does have a system in which voters can decide not to retain justices who have been confirmed, a process that led to the removal of three justices, including a woman and a Latino, in a divisive and controversial campaign in 1986. See Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2007 (1988) (examining the 1986 retention election in which voters decided not to retain Chief Justice Rose Bird and two other Justices, including a Latino, Cruz Reynoso, of the California Supreme Court).

76. See Maura Dolan, *What's the California Supreme Court Thinking? One Justice Gives Us a Clue*, L.A. TIMES (Mar. 31, 2016, 3:00 AM), <http://www.latimes.com/local/california/la-me-supreme-court-dissents-20160331-story.html> [<https://perma.cc/ZJ8H-MZLZ>]; Alexei Koseff, *Leondra Kruger Confirmed to California Supreme Court*, SACRAMENTO BEE (Dec. 22, 2014, 1:28 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article4821201.html> [<https://perma.cc/4UUU-NX63>]; Casey Tolan, *Meet Mariano-Florentino Cuéllar, the Potential Supreme Court Nominee Who Would be the First Mexican-American Justice*, FUSION (Feb. 22, 2016, 2:50 PM), <http://fusion.net/story/271518/mariano-florentino-cuellar-scalia-supreme-court/> [<https://perma.cc/AG67-GTMV>]; see also Aebra Coe, *Calif. Making Strides in Judicial Diversity, Report Says*, LAW 360 (Mar. 1, 2017, 7:55 PM) <https://www.law360.com/articles/897260/calif-making-strides-in-judicial-diversity-report-says> [<https://perma.cc/FM3P-V6HP>] (reporting that "California is on track to outdo much of the nation in terms of judicial diversity . . .").

high level position in the United States Department of Justice.⁷⁷ President Obama previously had nominated Liu to the court of appeals, but he withdrew from consideration after the Senate filibustered a confirmation vote.⁷⁸ The contemporary California experience suggests that alternative modes of judicial confirmation of federal judges might help reduce the political infighting that tends to dominate the current Senate confirmation process.

B. The New Normal

The explosive issues surrounding judicial ideology today overshadow any other issue in federal judicial selections. Specifically, racial and gender diversity distantly trail political ideology in terms of priority to most presidents. To minimize controversy in politically contentious times, nominations have tended to be of sitting judges, which serves to greatly constrain efforts to increase the racial and gender diversity of the federal judiciary.⁷⁹ Justice Sotomayor, a former court of appeals judge, is an exception to this rule.

Some observers might see efforts to decrease the degree of political partisanship in the Senate confirmation process as unlikely, if not futile. However, in the past, the Senate was more open-minded about judicial nominees, similar to the approach followed for other presidential appointments. Efforts toward de-escalating the rising political divisiveness of the confirmation process are well worth exploring but are beyond the scope of this Essay.⁸⁰

III. A TRUMP PRESIDENCY AND THE DIVERSITY OF THE FEDERAL JUDICIARY

In modern times, ideology—not racial and gender diversity—appears to more significantly influence the nominations by the president, especially Republican presidents, to the federal bench. That focus has undermined efforts to diversify the federal judiciary, which is a more pronounced problem in Republican administrations in which

77. See *supra* note 76 (citing authorities).

78. See James Oliphant, *Court Nominee Withdraws; Goodwin Liu's Move is a Victory for Senate Republicans, Who Blocked a Vote*, L.A. TIMES, May 26, 2011, at A12.

79. See Epstein et al., *supra* note 63, at 941; *supra* text accompany notes 63-74.

80. See Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 784-94 (2010) (exploring possibilities for reforming the federal judicial confirmation process); Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, the federal judicial NOTRE DAME L. REV. 2233, 2255-66 (2013) (to the same effect).

ideological litmus tests on a number of contentious social issues dominate the judicial selections.

A. Diversity as a Positive Value in the Trump Administration?

There is little reason to think that President Trump will make racial and gender diversity a priority in his judicial appointments. First of all, to this point in time, President Trump's cabinet appointments have been rather homogeneous.⁸¹ For example, his nomination of Senator Jeff Sessions as Attorney General, the nation's chief law enforcement officer, contrasts sharply with the two African Americans, Eric Holder and Loretta Lynch, who served in that position under President Obama.⁸²

Moreover, during the 2016 presidential campaign, Donald Trump in an unprecedented move released two lists of potential nominees to the Supreme Court; those lists by all appearances were designed to demonstrate his conservative bona fides.⁸³ Trump's first list was an:

[A]ll-white list of eight men and three women. The second list, like the first, consist[ed] of bedrock conservatives, many with records hostile to abortion rights, same-sex marriage and federal regulations While the new list adds the name of just one more woman, it is more racially and ethnically diverse—one African-American state court judge, a Venezuelan-born federal judge and another federal judge of South Asian descent.⁸⁴

81. See Gregory Krieg & Eugene Scott, *White Males Dominate Trump's Top Cabinet Posts*, CNN (Jan. 19, 2017, 4:05 PM), <http://www.cnn.com/2016/12/13/politics/donald-trump-cabinet-diversity/index.html> [<https://perma.cc/74RQ-ZQJ9>].

82. See Sari Horwitz & Ellen Nakashima, *Jeff Sessions is Expected to Bring Sweeping Changes to the Justice Department*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/world/national-security/jeff-sessions-is-expected-to-bring-sweeping-changes-to-the-justice-department/2016/11/18/f480019c-ad93-11e6-8b45-f8e493f06fcd_story.html [<https://perma.cc/Y73L-36PY>].

83. See Ed Whelan, *Trump's Supreme Court Candidates*, NAT'L REV. (Nov. 9, 2016, 1:46 PM), <http://www.nationalreview.com/bench-memos/442036/trump-list-supreme-court-candidates> [<https://perma.cc/5RNW-TFM2>].

84. Nina Totenberg, *Donald Trump Unveils New, More Diverse Supreme Court Short List*, NAT'L PUB. RADIO (Sept. 23, 2016, 3:22 PM), <http://www.npr.org/2016/09/23/495216645/donald-trump-unveils-new-more-diverse-supreme-court-short-list> [<https://perma.cc/6RBA-Q6ZG>]; see Mark Walsh, *Trump's Court: How Will the Next President Shape the Supreme Court?*, A.B.A. J. 20, 21 (2017) (noting that a number of names on Trump's lists of potential Supreme Court nominees "were provided by the Federalist Society," a conservative legal advocacy group). Trump's potential nominees, however, would add diversity to the Court in

Not surprisingly, President Trump nominated a white man, court of appeals Judge Neil Gorsuch, to the Court shortly after his inauguration in 2017, and the Republican-controlled Senate promptly held confirmation hearings.⁸⁵

B. Minority Identity as Potential Bias

The lack of racial and gender diversity on Donald Trump's two lists of potential Supreme Court nominees may be explained by the fact that it appears that President Trump considers minority status to be a potential source of bias in judicial decision-making.⁸⁶ During his presidential campaign, he vociferously attacked a federal judge presiding over civil fraud lawsuits against Trump University; he:

[S]aid that U.S. District Judge Gonzalo Curiel had “an absolute conflict” in presiding over the litigation given that he was “of Mexican heritage” and a member of [a] Latino lawyer’s association. Mr. Trump said the background of the judge, who was born in Indiana to Mexican immigrants, was relevant because of his campaign stance against illegal immigration and his pledge to seal the southern U.S. border.⁸⁷

Judge Curiel once had been a member of La Raza Lawyers of California, a mainstream bar association of Latina/o lawyers like ones that exist in many states and localities in the United States.⁸⁸

terms of geography and non-Ivy League law school pedigree. *See* Ariane de Vogue, *Trump Could Bring a Different Kind of Diversity to the Supreme Court*, CNN (Dec. 6, 2016, 11:01 AM), <http://www.cnn.com/2016/12/06/politics/trump-diversity-supreme-court/> [<https://perma.cc/VE6L-HTUP>].

85. *See* Robert Barnes, *Trump Picks Colo. Appeals Court Judge Neil Gorsuch for Supreme Court*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/politics/trump-picks-colo-appeals-court-judge-neil-gorsuch-for-supreme-court/2017/01/31/2b08a226-e55e-11e6-a547-5fb9411d332c_story.html [<https://perma.cc/TS92-VZP9>]. As this Essay goes to press, the Senate has yet to vote on Gorsuch’s confirmation.

86. *See* Johnson & Fuentes-Rohwer, *supra* note 16, at 22–23 (analyzing the concern of bias among minority judges).

87. Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016, 10:03 AM), <http://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442> [<https://perma.cc/U8YD-YLNJ>]. Trump later backtracked somewhat from his claim that Judge Curiel’s ancestry made him incapable of being impartial. *See* Alan Rappeport, *Donald Trump Says His Remarks on Judge Were ‘Misconstrued,’* N.Y. TIMES (June 7, 2016), https://www.nytimes.com/2016/06/08/us/politics/trump-university-judge.html?_r=1 [<https://perma.cc/T3EP-YNZB>].

88. *See* Alan Rappeport, *That Judge Attacked by Donald Trump? He’s Faced a Lot Worse*, N.Y. TIMES (June 3, 2016),

“Speaker of the House Paul Ryan [at the time] called Trump’s warning about judicial bias relative to American-born Curiel’s Mexican heritage the ‘textbook definition of a racist comment,’ and other [Republican] leaders . . . similarly condemned the remark.”⁸⁹ Despite Trump’s public attacks, Judge Curiel did not respond publicly and continued presiding over the Trump University cases; shortly after the 2016 election, he approved a \$25 million settlement.⁹⁰ Judge Curiel’s various other orders in those cases appear to be unremarkable.⁹¹

Politely put, Donald Trump appeared to view Judge Curiel’s Mexican ancestry with suspicion, if not antipathy. Given Trump’s allegations against Judge Curiel, a respected federal judge who had been a federal prosecutor,⁹² it appears that at some level Trump harbors a negative, not positive, view about racial minority status of judges on the federal bench. (Given Trump’s immigration positions, this appears especially to be the case with respect to Latina/os.) President Trump seems to consider minority ancestry to be a source of potential bias, with such bias arguably more pronounced in cases involving the civil rights of minorities. Such concerns are not new and contributed to the aggressive questioning of Justice Sotomayor in her confirmation hearings about her reference in a speech to a “wise Latina.”⁹³

<https://www.nytimes.com/2016/06/04/us/politics/donald-trump-university-judge-gonzalo-curiel.html> [<https://perma.cc/B6EY-8EEC>]. The founders of the organization included Cruz Reynoso, former Justice on the California Supreme Court. *See Newsletter Page*, LA RAZA LAW. OF CAL., <http://larazalawyers.net/id2.html> [<https://perma.cc/B22F-SC2W>] (last visited Mar. 12, 2017).

89. Lucy Schouten, *Donald Trump and Judges: A Testy Combination*, CHRISTIAN SCI. MONITOR (June 23, 2016), <http://www.csmonitor.com/USA/2016/0623/Donald-Trump-and-judges-a-testy-combination> [<https://perma.cc/2CXB-RDAC>]; *see* Editorial, *The Judicial System According to Trump*, N.Y. TIMES, June 7, 2016, at A20; Michael Finnegan, *Trump Courting Trouble; The Candidate’s Attack on a Latino Judge and Other Racial Comments Pose Major Risks for the Republican Party*, L.A. TIMES, June 6, 2016, at A1.

90. *See* Steve Eder & Jennifer Medina, *Trump University Suit Settlement Approved by Judge*, N.Y. TIMES, Mar. 31, 2017 (reporting that Judge Curiel approved the settlement of a class action against Trump University); Kristina Davis, *Trump Reverses on Fraud Lawsuits; After Insisting He Would Not Settle Cases Against His Real Estate ‘University,’ He Agrees to Pay \$25 Million*, L.A. TIMES, Nov. 19, 2016, at B1.

91. *See, e.g., Low v. Trump Univ. LLC*, No. 3:10-cv-00940-GPC-WVG, 2016 U.S. Dist. LEXIS 158830 (S.D. Cal. Nov. 15, 2016) (ruling on motions in limine); *Low v. Trump Univ., LLC*, No. 3:10-cv-00940-GPC-WVG, 2016 U.S. Dist. LEXIS 125854 (S.D. Cal. Sept. 15, 2016) (application to continue trial date); *Cohen v. Trump*, No. 3:13-cv-2519-GPC-WVG, 2016 U.S. Dist. LEXIS 117059 (S.D. Cal. Aug. 29, 2016) (evidentiary rulings); *Cohen v. Trump*, 200 F. Supp. 3d 1063 (S.D. Cal. 2016) (summary judgment).

92. *See* Greg Moran, *Associates Speak Well of Judge Attacked by Trump*, SAN DIEGO UNION TRIB., June 5, 2016, at A1.

93. *See supra* notes 48–53 and accompanying text.

In 1974, Judge A. Leon Higginbotham famously rejected claims that his racial ancestry alone might require his disqualification as a judge in a civil rights lawsuit on the grounds of bias.⁹⁴ He explained the ruling as follows:

I am black. I do not apologize for that obvious fact. I take rational pride in my heritage, just as most other ethnics take pride in theirs. However, that one is black does not mean, *ipso facto*, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant. As do most blacks, I believe that the corridors of history in this country have been lined with countless instances of racial injustice. This is evident by the plain historical fact that for more than two and a half centuries, millions of blacks were slaves under the rule and sanction of law—a fate which confronted no other major minority in this country. Every presidential commission and almost every Supreme Court opinion dealing with racial matters have noted the fact that in this country, there has often been racial injustice for blacks.⁹⁵

Donald Trump's view of diversity-as-bias fits comfortably into his frequent challenges to what he views as the nation's prevailing "political correctness."⁹⁶ His controversial attacks on Mexican immigrants as criminals, Muslims as terrorists, and racial minorities generally⁹⁷ further suggests that he considers a minority background to be problematic rather than a positive attribute of a potential judicial nominee.

94. See *Pennsylvania v. Local Union 542*, 388 F. Supp. 155 (E.D. Pa. 1974).

95. *Id.* at 163–65 (citations omitted); see Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 325–30 (2002) (discussing Judge Higginbotham's ruling); Frank M. McClellan, *Judicial Impartiality & Recusal: Reflections on the Vexing Issue of Racial Bias*, 78 TEMP. L. REV. 351, 373–74 (2005) (to the same effect).

96. See *Republican Party Needs to Learn that Character Matters*, ARIZ. REPUBLIC, June 25, 2016, at A21 (“[I]t is clear that Trump's organizing commitments are ethnic nationalism and a belief that the American government is too weak – too constrained by political correctness – in dealing with threats to American identity.”).

97. See Julia Preston et al., *Donald Trump Win Has Blacks, Hispanics and Muslims Bracing for a Long 4 Years*, N.Y. TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/10/us/donald-trump-blacks-hispanics-muslims.html?_r=0 [<https://perma.cc/N4JS-HC9M>]; see also Lindsay Perez Huber, “*Make America Great Again!*”: *Donald Trump, Racist Nativism and the Virulent Adherence to White Supremacy Amid U.S. Demographic Change*, 10 CHARLESTON L. REV. 215, 222–32 (2016) (reviewing the white supremacist themes underlying the 2016 presidential campaign of Donald Trump).

CONCLUSION

Over the last fifty years, the racial and gender demographics of the federal judiciary have been slowly but surely changing.⁹⁸ The efforts to diversify the corps of federal judges, however, have been hampered by the contemporary ideological battles in Congress over judicial selection.⁹⁹ Diversity concerns are often lost in the ideological shuffle, with judicial philosophies over constitutional interpretation taking precedence over virtually all else in the modern judicial confirmation process. Efforts to diversify the federal judiciary would benefit measurably from a return to a less ideologically-charged nomination and Senate confirmation process.¹⁰⁰

In addition, President Trump seems to have a suspicious, if not sinister, view of racial diversity in the judiciary.¹⁰¹ That view militates against placing a strong positive value on increasing the diversity of federal judges. Consequently, one might reasonably expect the Trump Administration to lack the commitment to diversity in judicial appointments possessed by President Obama and perhaps even President George W. Bush.¹⁰²

In a politically-divided Senate, we can expect continued controversy in federal judicial selection, especially with respect to the nomination and confirmation of justices to the Supreme Court. Ideological considerations by all appearances will continue to predominate, with the diversity of the federal bench likely suffering as a result. Time will tell whether political divisions will calm and better allow the Senate to perform its constitutional role with respect to presidential judicial nominations.

98. *See supra* Part I.B.

99. *See supra* Part II.

100. *See supra* notes 75–80 and accompanying text.

101. *See supra* Part III.B.

102. *See supra* Part I.B., notes 42–44 and accompanying text.