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Judge Thompson and the Appellate Court Confirmation Process

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ESSAY

JUDGE THOMPSON AND THE APPELLATE COURT CONFIRMATION PROCESS

CARL TOBIAS*

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INTRODUCTION

Judge O. Rogeriee Thompson's appointment to the United States Court of Appeals for the First Circuit was an historic moment, as she became the tribunal's first African American member. The Senate confirmed her in five months on a 98-0 vote, more expeditiously than any of President Barack Obama's other appellate nominees. Indeed, Fourth Circuit nominee Judge Albert Diaz waited thirteen months for approval. The slow pace of judicial confirmation demonstrates that the charges and recriminations, the partisanship and the serial paybacks, which have infused appointments for two decades, remain. Judge Thompson's confirmation, accordingly, deserves celebration and recounting. It both illuminates the contemporary process and helps provide suggestions for improvements.

Part I of this Essay descriptively reviews judicial selection under the Obama Administration and Judge Thompson's appointment specifically. Part II critically evaluates the process that led to the confirmation of Judge

* Williams Professor, University of Richmond School of Law. I wish to thank Peggy Sanner for valuable suggestions, Stanley Hammer for valuable research, Tracy Cauthorn for valuable processing, the *Boston University Law Review* editors for working with me on this piece, and Russell Williams for generous, continuing support. Errors that remain are mine.

Thompson. Part III then offers suggestions, derived in part from Judge Thompson's experience, to improve the process for the future.

I. DESCRIPTIVE ANALYSIS OF THE SELECTION PROCESS

A. *The Obama Administration Selection Process*

The history of the Obama Administration's judicial selection, which underlay Judge Thompson's appointment, only needs brief canvassing in this Essay, as the background has been detailed elsewhere.¹ An inquiry into that history should expand comprehension of the appointments regime, her confirmation, the selection process's problems, and salutary means for addressing its inherent difficulties.

Upon election, Obama quickly picked Gregory Craig as White House Counsel, whose office led appellate court selection in conjunction with the Department of Justice (DOJ), which prepared information on the nominees for analysis.² Craig's office and the DOJ foresaw and addressed many important selection issues – such as an early Supreme Court vacancy – by articulating numerous qualifications and assembling “short lists” of highly capable people.³ Obama also restored the use of American Bar Association (ABA) evaluations before nominations,⁴ concluding that the ABA's experience in assessing and

¹ See, e.g., Carl Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 776-81 (2010) (detailing the development of Obama's judicial selection process); Peter Baker & Adam Nagourney, *Tight Lid Defined Process for New Justice: Using Past Battles to Avert Pitfalls*, N.Y. TIMES, May 28, 2009, at A1; Jeffrey Toobin, *Bench Press: Are Obama's Judges Really Liberals?*, NEW YORKER, Sept. 21, 2009, at 42; see also Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living up to Them?*, 7 FORUM, no. 1, 2009 (speculating on how Obama's judicial selection process and the resulting judiciary might look).

² CHRISTINE NEMACHECK, STRATEGIC SELECTION 36 (2007); Jonathan Weisman, *Obama Hires More Clinton White House Veterans*, WALL ST. J., Nov. 17, 2008, at A3; see also Jon Ward, *White House Beefs up Legal Staff*, WASH. TIMES, July 21, 2009, at B1 (describing how Obama increased staffing in the White House Counsel Office to focus on nominations); Doug Kendall, *Fill the Bench Now*, SLATE (Feb. 5, 2010, 12:23 PM), <http://www.slate.com/id/2243845/> (citing the low number of Obama nominees and urging the Administration to be more aggressive in the process); sources cited *supra* note 1.

³ Peter Baker & Jeff Zeleny, *Obama Chooses Hispanic Judge for Supreme Court Seat*, N.Y. TIMES, May 27, 2009, at A1; Keith Koffler, *Biden's Staff Has Key Role in Sotomayor Confirmation*, ROLL CALL, May 26, 2009, available at <http://www.rollcall.com/news/35256-1.html> (subscription required); see also Baker & Nagourney, *supra* note 1.

⁴ Doug Kendall, *Confirmation Warriors*, SLATE (Oct. 8, 2010, 11:29 AM), <http://www.slate.com/id/2270327/> (“[Obama] has reinstated pre-nomination ABA screening, which President George W. Bush stopped, and he has not chosen a single nominee deemed ‘not-qualified’ by the ABA.”); Letter to Martha Barnett, ABA President, from Alberto Gonzales, White House Counsel (Mar. 22, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010322-5.html> (rejecting the suggestion that the ABA evaluate and rate judicial nominees before

rating candidates helped bring to the surface early concerns and allowed the President and designees to avoid embarrassment and save resources.⁵ Moreover, President Obama adopted effective methods of increasing ethnic and gender diversity on the bench by approaching less conventional groups as well as minority and female politicians, who assessed and suggested numerous minorities and women as possible nominees.⁶

President Obama has stressed bipartisanship in the nomination process, primarily by seeking guidance from Democratic *and* Republican politicians in states with vacancies before choosing nominees. Many of these politicians have created panels that identified able candidates who were forwarded to, and later nominated by, President Obama. The procedures adopted by these panels and elected officials varied, with some ranking their preferences and others submitting only one individual,⁷ but all generally produced highly competent and diverse candidates across a spectrum of ethnicities, genders, and ideologies.⁸

The White House has traditionally accorded less deference to the politicians in the appellate selection process because the regional circuits encompass multiple states, have fewer openings, and are essentially the courts of last resort for ninety-nine percent of appeals – deciding controversial questions related to issues such as federalism, the death penalty, and terrorism.⁹ The

nomination). For information regarding the Bush Administration's relationship with the ABA, see Sheldon Goldman et al., *W. Bush's Judiciary: The First Term Record*, 88 JUDICATURE 244, 254, 254-55 (2005); Laura Little, *The ABA's Role in Prescreening Federal Judicial Candidates*, 10 WM. & MARY BILL RTS. J. 37, 39-44 (2001).

⁵ Terry Carter, *Do-Over After an 8-Year Pause, the ABA is Again Vetting Possible Federal Bench Nominees*, A.B.A. J., May 2009, at 62, 62-63; see also AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1 (1983).

⁶ Carl Tobias, *Diversity and the Federal Bench*, 87 WASH. U. L. REV. 1197, 1203 (2010).

⁷ See Bob Egelko, *Feinstein Taps Bipartisan Panel to Pick Judges*, S.F. CHRON., Jan. 5, 2009 at B1; Wis. Fed. Nominating Comm'n Charter sec. I (Nov. 20, 2008), available at <http://www.wisbar.org/AM/Template.cfm?Template=/CM/ContentDisplay.cfm&ContentID=45337> (establishing a commission to advise Wisconsin Senators on selecting United States Appeals and District Court nominees). See generally RUSSELL WHEELER & REBECCA LOVE KOURLIS, OPTIONS FOR FEDERAL JUDICIAL SCREENING COMMITTEES 7-11 (2010), available at <http://www.du.edu/legalinstitute/pubs/FederalJudicialSelection.pdf> (highlighting possible methods of creating and implementing screening committees to assist in the nomination process); Goldman, *supra* note 1.

⁸ See, e.g., Tricia Bishop, *Judicial Endorsement; Mikulski, Cardin Back Judge Davis for U.S. Appeals Court*, BALT. SUN, Mar. 12, 2009, at 11A; Joe Ryan, *Federal Judge from Jersey to Fill Alito's Old Seat Senate Confirms Greenaway for Third Circuit Court of Appeals Post*, STAR LEDGER, Feb. 10, 2010, at 26; *infra* notes 36-45.

⁹ Neil A. Lewis, *Move to Limit Clinton's Judicial Choices Fails*, N.Y. TIMES, Apr. 30, 1997, at D22; Michael D. Shear, *Obama nominates Alito opponent as appeals judge*, WASH. POST, Feb. 25, 2010, at A21; Eric Haren, *The Real Battle for the Federal Judiciary*, NAT'L L.J. (July 31, 2009), <http://www.law.com/jsp/article.jsp?id=1202432541517&thepage=1>

Executive generally sought more than one proposal and tapped someone from the jurisdiction for each vacancy.¹⁰

After making its selections, the Obama Administration has steadily proposed nominees, using press releases to announce the nomination of a few prospects simultaneously.¹¹ This differs from the practice of Presidents Bill Clinton and George W. Bush, who submitted large packages of nominees at Senate recesses, a practice that frustrated smooth processing.¹² Obama also depoliticized the appointments regime by personally introducing only Judge Sonia Sotomayor and Solicitor General Elena Kagan. Each took her oath at the Court, instead of the White House, a gesture with telling pragmatic and symbolic value for the separation of powers.¹³ These methods contrast with

(discussing the importance of the lower federal courts and how judicial vacancies may be filled to tip the political scales); Letter from Bruce Ackerman, Professor, Yale Univ. et al., to Barack Obama, President of the United States (Feb. 24, 2010) [hereinafter Ackerman Letter], available at http://media.washingtonpost.com/wp-srv/politics/documents/letterto-presidentobama022_410.pdf; see also RICHARD POSNER, *THE FEDERAL COURTS* 80-81 (1996).

¹⁰ See, e.g., Press Release, White House, Office of the Press Sec'y, President Obama Nominates Judge Denny Chin for United States Court of Appeals for the Second Circuit, Judge O. Rogeriee Thompson for the United States Court of Appeals for the First Circuit (Oct. 6, 2009) [hereinafter Chin & Thompson Nominations], available at http://www.whitehouse.gov/the_press_office/President-Obama-Nominates-Judge-Denny-Chin-for-United-States-Court-of-Appeals-for-the-Second-Circuit-Judge-O-Rogeriee-Thompson-for-United-States-Court-of-Appeals-for-the-F/; *infra* note 91. Obama has deferred more to elected officials on circuit nominations than other recent Presidents. This has basically assimilated circuit to district appointments because Presidents have traditionally deferred to the officials on district selections. See DENIS STEVEN RUTKUS, *ROLE OF HOME STATE SENATORS IN THE SELECTION OF LOWER FEDERAL COURT JUDGES* 5 (Cong. Research Serv. 2008), available at <http://www.fas.org/sgp/crs/misc/RL34405.pdf>.

¹¹ See, e.g., Chin & Thompson Nominations, *supra* note 10; Press Release, White House, Office of the Press Sec'y, President Obama Nominates Justice Barbara Milano Keenan to the United States Court of Appeals for the Fourth Circuit (Sept. 14, 2009), available at <http://www.whitehouse.gov/the-press-office/presidential-nominations-sent-senate-91409>.

¹² For the nominations of Obama's predecessors, see *107th Congress - Judicial Nominees*, U.S. DEP'T OF JUST., <http://www.justice.gov/archive/olp/nominations107.htm> (last visited Nov. 16, 2010); *Archive of Judicial Vacancies - 1997*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx> (last visited Nov. 16, 2010); see also Tobias, *supra* note 1, at 773; James Oliphant, *Obama Slow to Appoint Judges; The Administration's Chance to Reshape the Federal Courts May Be Slipping Away*, L.A. TIMES, Mar. 15, 2010, at A1 (criticizing the slow pace at which Obama has nominated and confirmed judges to fill vacancies).

¹³ See Laura Litvan, *Kagan Sworn in by Roberts to Become 112th Supreme Court Justice*, BLOOMBERG BUS. WK. (Aug. 8, 2010, 12:01 AM), <http://www.businessweek.com/news/2010-08-08/kagan-sworn-in-by-roberts-to-become-112th-supreme-court-justice.html> (reporting that Kagan's swearing-in, like Sotomayor's, reflected a "change in venue that Obama urged to stress the independence of the court system"); Charlie Savage, *Obama Backers Fear Opportunities to Reshape Judiciary Are Slipping Away*, N.Y. TIMES,

those of President Bush, who used the White House for a ceremony attended by his first regional court of appeals nominees.¹⁴ President Obama's approach to conciliation also differed, as Obama has pledged that he would stop acrimony by consulting both parties and selecting able, consensus picks.¹⁵

Often before nomination, and invariably later, the White House and DOJ have coordinated with Senators Patrick Leahy (D-Vt.), the Judiciary Committee Chair who arranges committee hearings and votes, and Harry Reid (D-Nev.), the Majority Leader who sets floor action, as well as their Grand Old Party (GOP) counterparts, Senators Jeff Sessions (Ala.) and Mitch McConnell (Ky.). Democrats and Republicans diligently analyzed nominees with full questionnaires, hearings, and swift ballots. Although the parties worked together on certain matters,¹⁶ Republicans did not always cooperate. For example, without convincing reasons, GOP members have held over votes for a week for many nominees, most of whom received approval the very next meeting.¹⁷

Nov. 15, 2009, at A20 (discussing Obama's approach of "going slower and lessening the visibility of nominations"); see also Peter Baker & Jeff Zeleny, *Obama Said to Pick Solicitor General for Court*, N.Y. TIMES, May 10, 2010, at A1; Robert Barnes & Paul Kane, *Senate Confirms Kagan as Justice*, WASH. POST, Aug. 6, 2010, at A1; Shailagh Murray & Michael D. Shear, *First Latina Picked for Supreme Court*, WASH. POST, May 27, 2009, at A1.

¹⁴ Neil A. Lewis, *Bush Appeals for Peace on his Picks for the Bench*, N.Y. TIMES, May 10, 2001, at A29. See generally Sheldon Goldman et al., *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282 (2003).

¹⁵ David Savage, *Senate Face-Off Is Due over Judicial Nominee*, L.A. TIMES, Nov. 16, 2009, at A13; Jeffrey Toobin, *Where Are the Judges?*, NEW YORKER, (Jan. 20, 2010), <http://www.newyorker.com/online/blogs/newsdesk/2010/01/one-year-where-are-the-judges.html> (blog entry); Carl Tobias, *The New Postpartisan Selection of Federal Judges: President Obama Displays his Commitment to Ending the Confirmation Wars*, FINDLAW (April 2, 2009), http://writ.news.findlaw.com/commentary/20090402_tobias.html; see also Stephen Dinan, *President's Bipartisan Call Hits Wall of Dissent*, WASH. TIMES, Feb. 9, 2010, at A1.

¹⁶ When Senator Leahy set a hearing so fast that GOP members lacked preparation time, he scheduled another. Maureen Groppe, *No Sparks Fly at Hearing*, INDIANAPOLIS STAR, Apr. 30, 2009, at 3A. Senator Sessions also acceded to the unusual practice of conducting one hearing for two Fourth Circuit nominees. Webcast of *Nominations of James Wynn and Albert Diaz to be Judges for the Fourth Circuit: Hearing Before the Senate Judiciary Comm.*, U.S. Sen. Comm. on the Judiciary (Dec. 16, 2009, 3:00 PM), <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=4227> [hereinafter *Wynn-Diaz Hearing*].

¹⁷ Senator Sessions made Judges Diaz, Wynn, and Keenan, whom he earlier lauded, wait at a time when the Fourth Circuit had many openings. See *Wynn-Diaz Hearing*, *supra* note 16; Webcast of *Nomination of Barbara Keenan to be Judge for the Fourth Circuit: Hearing Before the Senate Judiciary Comm.*, U.S. Sen. Comm. on the Judiciary (Oct. 7, 2009, 4:00 PM), <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=4101> (statement of Sen. Cardin) [hereinafter *Keenan Hearing*]; Webcast of *Executive Business Meeting*, U.S. Sen.

In 2009, floor action in the Senate was slow. The body debated and voted on three nominees approved by the committee. Senator Reid attempted to coordinate with Senator McConnell and other GOP lawmakers, yet they did not reciprocate. The Minority Leader also neglected to enter agreements on votes for court of appeals prospects until Justice Sotomayor's confirmation, delaying approval of the initial appellate court possibility until September.¹⁸ Democrats consumed months pursuing accords for nominees who ultimately won easy confirmation. For example, one 2009 appointee, Second Circuit Judge Gerard Lynch, waited three months for a 94-3 vote.¹⁹ Republicans insisted on reserving much debate time for specific nominees but actually used little of it.²⁰

Unanimous consent allows one Senator to halt nominees by placing secret holds on capable uncontroversial designees.²¹ Secret holds were traditionally

Comm. on the Judiciary (Oct. 22, 2009, 10:00 AM), <http://judiciary.senate.gov/hearings/hearing.cfm?id=4130> (holding over the Keenan nomination to a future committee meeting); Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary (October 29, 2009, 10:00 AM), <http://judiciary.senate.gov/hearings/hearing.cfm?id=4142> (reporting Keenan's nomination out of committee); Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary (Dec. 17, 2009, 10:00 AM), <http://judiciary.senate.gov/hearings/hearing.cfm?id=4240> (Senator Sessions stating that complaining about stalled Fourth Circuit nominations was like a child who kills his parents and complains he is an orphan, as Democrats had stalled Republican attempts to fill those same vacancies); Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary (Jan. 21, 2010, 10:00 AM) <http://judiciary.senate.gov/hearings/hearing.cfm?id=4340> (holding over Diaz and Wynn).

¹⁸ Haren, *supra* note 9; see also 156 CONG. REC. S904 (daily ed. Mar. 2, 2010) (statement of Sen. Leahy) (criticizing Republicans for filibustering Obama's court nominees and subsequently causing large delays in confirmations); Michael Fletcher, *Obama Criticized as Too Cautious, Slow on Judicial Posts*, WASH. POST, Oct. 16, 2009, at A1; Kendall, *supra* note 2.

¹⁹ 155 CONG. REC. S9541 (daily ed. Sept. 17, 2009) (statement of Sen. Leahy). Judges Andre Davis and Joseph Greenaway waited longer. *Id.* at S11282 (daily ed. Nov. 9, 2009); 156 CONG. REC. S510, S525 (daily ed. Feb. 9, 2010) (statement of Sen. Leahy). *But see id.* at S519 (statement of Sen. Sessions) (rebutting the accusation that Republicans objected every time the Majority Leader attempted to schedule a vote on Greenaway's nomination and expressing his support for the nominee). Some nominees waited yet even longer. See *infra* note 99. For the nominees' qualifications and backgrounds, see *supra* notes 8, 12; *infra* note 20.

²⁰ For example, Republicans sought an hour for Eleventh Circuit Judge Beverly Martin but used ten minutes, after which she was confirmed 97-0. 156 CONG. REC. S13 (daily ed. Jan. 20, 2010); see also Bill Rankin, *Senate Approves Martin for Appeals Court*, ATLANTA J. - CONST. (Jan. 21, 2010, 4:11 PM), <http://www.ajc.com/news/atlanta/senate-confirms-martin-as-279058.html>; Kendall, *supra* note 2.

²¹ See Ted Barrett, *Republicans Won't Budge on Secret Holds on Obama Nominees*, CNN POLITICS (May 7, 2010, 2:09 PM) <http://www.cnn.com/2010/POLITICS/05/07/senate.democrats.gop/index.html>. The 112th Senate abolished secret holds. 157 CONG. REC. S296 et seq. (daily ed. Jan. 27, 2011).

rare because they demand that proponents seek cloture petitions. However, Republicans have used them frequently, squandering floor time and prolonging court vacancies and, therefore, the resolution of many appeals.²² Virginia Supreme Court Justice Barbara Milano Keenan's appointment elucidates those phenomena, as the very qualified, noncontroversial jurist had been waiting four months to be considered when the body adopted a cloture petition 99-0 and ultimately approved her by the same margin.²³

In 2009, the Democrats successfully invoked cloture once to encourage a nominee vote, inflaming the GOP and enhancing delay.²⁴ That incident, like Keenan's experience, illuminated striking partisanship. On March 17, President Obama submitted Judge David Hamilton as his first nominee.²⁵ He meticulously picked Hamilton for the Seventh Circuit after consulting Indiana Senators Evan Bayh (D) and Richard Lugar (R), both of whom "enthusiastically supported" the jurist.²⁶ Notwithstanding his impeccable decade-and-a-half record as a prominent district judge and top ABA rating, the GOP opposed Hamilton. Senator Sessions asserted that Obama "chose to set an aggressive tone" with the "clearly controversial" ex-Indiana ACLU Board Member because he "drove a political agenda," endorsing the ideas of a "living Constitution" and empathy as jurisprudential tenets.²⁷ The Senator attempted

²² Barrett, *supra* note 21.

²³ 156 CONG. REC. S910 (daily ed. Mar. 2, 2010); Oliphant, *supra* note 12; *see also* 156 CONG. REC. S904 (daily ed. Mar. 2, 2010) (statement of Sen. Leahy); Doug Kendall, *The Bench in Purgatory*, SLATE (Oct. 26, 2009, 9:34 AM), <http://www.slate.com/id/2233309/>. *But see* 156 CONG. REC. S510, 519 (daily ed. Feb. 9, 2010) (statement of Sen. Sessions) (rebutting the accusation that Republicans stalled Keenan's confirmation, asserting that Democrats had sought Republican consent to proceed on the floor only two weeks earlier).

²⁴ *See, e.g.*, Dana Milbank, *Filibusted*, WASH. POST, Nov. 18, 2009, at A2; Carl Tobias, *Ending Confirmation Wars*, BALT. SUN, Nov. 30, 2009, at 15A; David Fontana, *Going Robe*, NEW REPUBLIC (Dec. 17, 2009, 12:00 AM), <http://www.tnr.com/article/environment-energy/going-robe?page=0,1> (criticizing Obama's moderate approach to judicial nominations as flawed in the face of Republicans' general unwillingness to cooperate).

²⁵ Michael Fletcher, *Obama Names Judge to Appeals Court*, WASH. POST, Mar. 18, 2009, at A4; Neil A. Lewis, *Moderate is Reported to be Pick for Court*, N.Y. TIMES, Mar. 17, 2009, at A14; Press Release, White House, Office of the Press Sec'y, President Obama Nominates Judge David Hamilton for the United States Court of Appeals for the Seventh Circuit (Mar. 17, 2009), *available at* http://www.whitehouse.gov/the_press_office/President-Obama-Announces-David-Hamilton-for-the-United-States-7th-Circuit-Court-of-Appeals.

²⁶ After consulting both parties, Obama touted him as evidence of leaving the "confirmation wars behind us." Fletcher, *supra* note 18; Savage, *supra* note 15; Toobin, *supra* note 1; *see also* 156 CONG. REC. S904 (daily ed. Mar. 2, 2010) (statement of Sen. Leahy).

²⁷ 155 CONG. REC. S11411, S11413 (daily ed. Nov. 17, 2009) (statement of Sen. Sessions). He said "we're seeing a common DNA run through the Obama nominees[:] the ACLU chromosome." Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary (Oct. 15, 2009, 10:00 AM), <http://judiciary.senate.gov/hearings/hearing.cfm?id=4118>; Savage, *supra* note 15.

to orchestrate a filibuster, but Democrats, joined by ten Republicans, invoked cloture.²⁸ Hamilton won appointment, but nine GOP senators who had favored cloture opposed the judge even while recognizing that he merited a vote.²⁹

In 2009, President Obama submitted twelve circuit nominees;³⁰ three were appointed, while the committee approved six more and granted the others hearings.³¹ He also picked Judge Sotomayor for Justice David Souter's vacancy; her prompt confirmation was essential because the Court needed to have all its seats filled when the 2009 Term opened.³² Seven appellate prospects were Clinton district court appointees³³ and four were state jurists,³⁴

²⁸ 155 CONG. REC. S11411, S11420-22 (daily ed. Nov. 17, 2009) (statements of Sen. Sessions). Central to debate over Judge Hamilton was a case on Indiana statehouse prayer. See *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1131 (S.D. Ind. 2005) (barring the Speaker of the Indiana House of Representatives from holding sectarian prayer in official proceedings); see also Dahlia Lithwick, *Jesus v. Allah*, SLATE (Nov. 22, 2009, 8:38 AM), <http://www.slate.com/id/2236157/>. Senator Sessions argued that Hamilton banned prayers to Jesus yet allowed them to Allah. 155 CONG. REC. S11413-14 (daily ed. Nov. 17, 2009) (statements of Sen. Sessions). Others, however, said the judge honored the Court's religion cases. Senator Evan Bayh (D-Ind.) urged that Judge Hamilton "is not hostile to religion or Jesus." *Id.* at S11411, S11412 (statement of Sen. Bayh).

²⁹ 155 CONG. REC. S11544, S11552 (daily ed. Nov. 19, 2009); see Kate Phillips, *Hamilton Confirmed for Appeals Court*, N.Y. TIMES, Nov. 20, 2009, at A20; see also *infra* text accompanying note 95 (affording effects of cloture's use).

³⁰ Kendall, *supra* note 2; Savage, *supra* note 15; *Judicial Nominations - 111th Congress*, U.S. DEP'T OF JUST., <http://www.justice.gov/olp/nominations111.htm> (last visited November 16, 2010) [hereinafter *Judicial Nominations*].

³¹ *Judicial Nominations*, *supra* note 30 (listing the dates of all of Obama's 2009 nominations and their subsequent hearings and confirmations). The appointees were Judges Davis, Hamilton and Lynch.

³² This need worsened when the Court scheduled the September Ninth argument on *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). See David Savage, *Hilary: The Law Changer*, A.B.A. J., Sept. 2009, at 24, 25 (2009); Murray & Shear, *supra* note 13 (describing White House efforts to push Sotomayor's confirmation through the Senate).

³³ They are Judges Chin, Greenaway, Martin, and Vanaskie, and the three jurists *supra* note 31. See Goldman, *supra* note 1, at 11; Sherilynn Ifill, *Storming the Court?*, THE ROOT (Nov. 18, 2009), <http://www.theroot.com/views/storming-court>.

³⁴ They are Judges Diaz, Keenan, Thompson and Wynn. Elevation is a venerated practice because the jurists possess much relevant experience and have easily accessed records. Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L. Q. 741, 752 (1997); Neil Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, Apr. 10, 1990, at A1; *infra* text accompanying note 80. But see David Fontana & Micah Schwartzman, *Old World*, NEW REPUBLIC (July 17, 2009, 12:00 AM), <http://www.tnr.com/article/politics/old-world> (criticizing the Obama Administration for favoring older nominees rather than finding new, young legal talent on its own, as younger judges serve longer and thus have greater overall influence on the law).

reflecting a trend in the direction of a “career judiciary.”³⁵ The group was diverse,³⁶ and virtually all earned the preeminent ABA rating.³⁷

Last year, the Senate confirmed four of Obama’s 2010 appellate judicial nominees³⁸ as well as nine of his 2009 nominees.³⁹ The President also appointed Elena Kagan to Justice John Paul Stevens’s vacated seat.⁴⁰ Four of the 2010 nominees were Clinton appointees,⁴¹ and one was a state judge.⁴² This continued the 2009 practice of nominating sitting jurists.⁴³ Obama’s 2010 nominees, like those of 2009, are quite diverse,⁴⁴ and most received the highest ABA rating.⁴⁵

B. *Judge Thompson’s Selection Process*

When Barack Obama assumed the Presidency, one of the fourteen vacancies⁴⁶ was a Rhode Island First Circuit seat that had opened in late

³⁵ RUSSELL WHEELER, *THE CHANGING FACE OF THE FEDERAL JUDICIARY* 6-9 (Christine Jacobs ed., Brookings Institution 2009); Goldman, *supra* note 14, at 305.

³⁶ Davis, Greenaway, Thompson and Wynn are African American; Diaz is Latino; Chin is Asian American; and Keenan, Martin, Jane Stranch and Thompson are women. The twelve nominees’ average age is fifty-six. See Fontana & Schwartzman, *supra* note 34.

³⁷ ABA Standing Comm. on the Judiciary, *Ratings of Article III Judicial Nominees 111th Cong.*, A.B.A., <http://www.abanet.org/scfedjud/ratings/ratings111.pdf> (last updated October 1, 2010) [hereinafter *ABA Ratings*].

³⁸ *Confirmation Listing - 111th Congress*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ConfirmationListing.aspx> (last visited November 16, 2010).

³⁹ *Judicial Nominations*, *supra* note 30. The 2009 nominees confirmed in 2010 are Judges Chin, Diaz, Greenaway, Keenan, Martin, Stranch, Thompson, Vanaskie, and Wynn. The 2010 nominees confirmed that year are Raymond Lohier, Scott Matheson, Mary Murguia and Kathleen O’Malley.

⁴⁰ Her expeditious confirmation was important. See Baker, *supra* note 13; *supra* notes 13, 32.

⁴¹ They are Judges Robert Chatigny, Bernice Donald, Murguia and O’Malley.

⁴² Judge James Graves recently won Senate confirmation. See 157 CONG. REC. S664 (daily ed. Feb. 14, 2011).

⁴³ See *supra* notes 33-35 and accompanying text.

⁴⁴ Judges Donald, Graves, and Lohier are African American; Judge Murguia and attorney Jimmie Reyna are Latino; Professor Goodwin Liu is Asian American; Judges Donald, Murguia, and O’Malley, Susan Carney, Caitlin Halligan, and Professor Victoria Nourse are women; and Edward DuMont is openly gay. The 2010 nominees’ average age is fifty-two. ALLIANCE FOR JUSTICE, *THE STATE OF THE JUDICIARY* 17 (2010), available at <http://www.afj.org/press/04062010.html> (reporting the average age of Obama’s pending nominees at 52.4).

⁴⁵ *ABA Ratings*, *supra* note 37 (listing most of Obama’s nominees as “well qualified”).

⁴⁶ *Archive of Judicial Vacancies - February 2009*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx> (last visited November 16, 2010) (listing fourteen vacancies at the time of Obama’s inauguration).

2006.⁴⁷ Although President Bush nominated U.S. District Judge William E. Smith to fill the seat, the Senate failed to vote on him.⁴⁸ Thus, by 2009, the vacancy was pressing. This led Democratic Senators Jack Reed and Sheldon Whitehouse, of Rhode Island, to quickly create an open, in-depth procedure to recommend prospects for Obama's consideration. They solicited and received applications from extremely qualified candidates,⁴⁹ held extensive interviews, carefully deliberated, and proposed Judge Thompson on April 13.⁵⁰ In support of their recommendation, the legislators remarked that she was "an exceptional public servant . . . [who] possesses the legal background, intellect, and temperament to serve with distinction on the U.S. Court of Appeals for the First Circuit."⁵¹

Born and reared in segregated South Carolina, the jurist's life story is compelling.⁵² "Her great-grandfather, a plantation owner, bought her great-grandmother at a slave auction. They later fell in love and raised a family."⁵³ Thompson moved to Rhode Island where she earned a B.A. from Brown University and thereafter left the state to earn a law degree from Boston University School of Law.⁵⁴ She then returned to Providence, working as a Reginald Heber Smith Fellow for Rhode Island Legal Services and subsequently opened her own law firm.⁵⁵ In 1988, Thompson became a State District Court judge, and in 1997, she was elevated to the Rhode Island

⁴⁷ Judge Bruce Selya assumed senior status. *Archive of Judicial Vacancies - January 2007*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx> (last visited November 16, 2010); see Edward Fitzpatrick, *Senior Circuit Judge Bruce Selya: I Love My Court*, PROVIDENCE J., Sept. 14, 2008, at 1.

⁴⁸ *110th Congress - Judicial Nominations*, U.S. DEP'T OF JUST., <http://www.justice.gov/archive/olp/nominations.htm> (last visited November 16, 2010); see also Katie Mulvaney, *Torres Retires After 20 Years on Federal Bench*, PROVIDENCE J., Mar. 21, 2009, at 2.

⁴⁹ Press Release, Reed & Whitehouse Applaud Senate Judiciary Committee's Vote to Approve Thompson (Jan. 21, 2010), available at <http://whitehouse.senate.gov/newsroom/press/release/?id=732f8740-ba7d-45b8-9f2d-f0521f4413ce>; see Katie Mulvaney, *Five Seeking Seats on Federal Courts*, PROVIDENCE J., Feb. 12, 2009, at 2.

⁵⁰ See Press Release, Reed & Whitehouse, *supra* note 49. Thompson stated that she was inspired to apply because no African American had been a First Circuit member. Katie Mulvaney & John Mulligan, *R.I. Judge, Lawyer Selected for Federal Judgeships*, PROVIDENCE J., Apr. 14, 2009; Mulvaney, *supra* note 49.

⁵¹ Press Release, Reed & Whitehouse, *supra* note 49.

⁵² John Mulligan, *Obama Taps R.I. Judge for Court*, PROVIDENCE J., Oct. 7, 2009, at 1; Katie Mulvaney, *Support for R.I. Judge Not Unanimous*, PROVIDENCE J., Oct. 25, 2009, at 1.

⁵³ Mulvaney & Mulligan, *supra* note 50.

⁵⁴ *Id.*; Ben Szobody, *Former Sterling High Student Rises to Federal Appeals Court*, GREENVILLE NEWS, Mar. 20, 2010.

⁵⁵ See Mulligan, *supra* note 52; Mulvaney & Mulligan, *supra* note 50.

Superior Court, the first African American woman to serve on each of these courts.⁵⁶

After Senators Reed and Whitehouse recommended her, she underwent an FBI background check, an ABA evaluation, and a White House analysis and interview. On October 6, 2009, Obama announced her nomination, finding that she had “displayed exceptional dedication to public service, [had] served on the bench with distinction” and would be a “judicious and esteemed” First Circuit addition.⁵⁷ The ABA issued Judge Thompson’s rating that month, with a majority rating her qualified, or satisfactory, and a minority rating the jurist not qualified.⁵⁸ Despite this mixed rating, the White House maintained that it “strongly support[ed] Judge Thompson’s nomination and remain[ed] confident the Senate [would] support her nomination.”⁵⁹ Senators Reed and Whitehouse also reiterated their vociferous support and expressed concerns about the ABA’s evaluations.⁶⁰ Reed questioned whether disclosing only its final ranking without any explanation or support was “an effective way to rate a judge.”⁶¹ Whitehouse argued the rating showed that the ABA had a “distinct leaning” toward corporate practitioners and firms, and lacked appreciation for “judges who [were] actually in the trenches day-to-day.”⁶² Senator Sessions also observed that the ABA rating “[was] not dispositive.”⁶³

⁵⁶ See sources cited *supra* note 55.

⁵⁷ Chin & Thompson Nominations, *supra* note 12; see *supra* notes 50, 52.

⁵⁸ *ABA Ratings*, *supra* note 37. Eight or nine of fifteen members found she satisfied ABA standards for temperament, competence, and integrity, and at least five found she did not in some area. *Id.*; Mulvaney, *supra* note 52.

⁵⁹ Mulvaney, *supra* note 52. This was in response to a *Providence Journal* reporter’s question.

⁶⁰ Summarizing the Senators’ concerns:

Judge Thompson has a long and distinguished record as a lawyer and a judge in Rhode Island for over 20 years and is a highly qualified nominee with an exemplary record, the senators said in a joint statement last month. The ABA plays a limited advisory role, and has nowhere near the familiarity with judicial candidates that we do in Rhode Island. It is up to the Senate to decide who is qualified to serve on the federal bench – and we are confident that our colleagues in the Senate will support Judge Thompson.

Tracy Breton & Katie Mulvaney, *Senate Takes Closer Look at R.I. Judge*, PROVIDENCE J., Dec. 1, 2009, at 1.

⁶¹ John Mulligan, *A Mixed Review for R.I. Nominee*, PROVIDENCE J., Mar. 12, 2010, at 1.

⁶² Katie Mulvaney, *R.I. Judge’s Nomination Rolls Smoothly Through Senate Hearing*, PROVIDENCE J. (Dec. 2, 2009, 12:52 PM), http://www.projo.com/news/courts/content/THOMPSON_JUDICIARY__12-02-09_M6GL9HH_v20.3cf676a.html; see also Mulligan, *supra* note 61.

⁶³ Stephen Miller, his aide, said “this is what we consider an outlier as far as ABA ratings go,” adding that Judge Thompson was the only one of twenty-seven Obama nominees who received a “not-qualified” rating from a member of the committee. Breton & Mulvaney, *supra* note 60; see also John Mulligan, *Thompson Confirmed for Federal Court Seat*, PROVIDENCE J., Mar. 18, 2010, at 1.

Judge Thompson received a hearing on December 1, 2009, which Whitehouse chaired.⁶⁴ No GOP committee members attended, and the only Senator to appear was Al Franken (D-Minn.).⁶⁵ Forty family members and friends attended the twenty-five-minute proceeding at which Reed introduced her.⁶⁶ Afterward Whitehouse said: "I hope the smooth sailing . . . continues," suggesting that Republicans would experience difficulty questioning her confirmation because they had not appeared.⁶⁷ Senator Sessions's aide, Stephen Miller, cautioned that attendance did not indicate support and panel members would still submit written questions.⁶⁸ Senator Sessions asked Thompson about the role of empathy in court decisions, and she responded that determinations should be premised only on the law.⁶⁹ To Senator Tom Coburn's (R-OK) query about her ABA ranking, Judge Thompson responded that she was unable to determine why the ABA rated her as it did because the process is confidential, but added that she would bring two decades as a "neutral judicial arbiter" to the bench.⁷⁰

On January 21, 2010, the panel approved Judge Thompson on a voice vote,⁷¹ and only Whitehouse spoke about the jurist, lauding her as a "careful, expert judge known for . . . fairness and moderation."⁷² Despite this support, the Senate waited until March 17 to confirm her 98-0 with reiterated support

⁶⁴ Webcast of *Nomination of O. Rogeriee Thompson, to be United States Circuit Judge for the First Circuit: Hearing Before the Senate Judiciary Comm.*, U.S. Sen. Comm. on the Judiciary (Dec. 1, 2009, 10:00 AM), <http://judiciary.senate.gov/hearings/hearing.cfm?id=4199> [hereinafter Thompson Hearing]; see Mulvaney, *supra* note 62.

⁶⁵ Mulvaney, *supra* note 62. Franken posed few questions but did ask about diversity. Thompson responded: "My job is to make sure I don't have preconceived notions about persons." Thompson Hearing, *supra* note 64; see also Mulvaney, *supra* note 62; Mulligan, *supra* note 63.

⁶⁶ Mulvaney, *supra* note 62. The Senators repeated criticism of the ABA. Thompson Hearing, *supra* note 64; see *supra* notes 58-59 and accompanying text.

⁶⁷ Mulvaney, *supra* note 62.

⁶⁸ *Id.*; see also *Responses of O. Rogeriee Thompson, Nominee to the U.S. Court of Appeals for the First Circuit, to the Written Questions of Senators Jeff Sessions and Tom Coburn*, U.S. Sen. Comm. on the Judiciary <http://judiciary.senate.gov/nominations/111thCongressJudicialNominations/upload/OjettaRogerieeThompson-QFRs.pdf> (last visited November 17, 2010) [hereinafter Thompson Responses].

⁶⁹ Thompson Responses, *supra* note 68, at 4; see also Katie Mulvaney, *Thompson: Rulings Based on Law, Not Empathy*, PROVIDENCE J., Dec. 16, 2009, at 10.

⁷⁰ Thompson Responses, *supra* note 68, at 6 (asking Thompson whether she was satisfied with her ABA rating). Later responses supported this neutral approach. For example, when questioned about the Second Amendment, Thompson answered that she would follow Supreme Court precedent rather than expressing her own views on the issue. *Id.* at 8.

⁷¹ John Mulligan, *Senate Gets Thompson Nomination*, PROVIDENCE J., Jan. 22, 2010, at 4; Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary (January 21, 2010, 10:00 AM), <http://judiciary.senate.gov/hearings/hearing.cfm?id=4340>.

⁷² See sources cited *supra* note 71.

from the Rhode Island Senators,⁷³ and absent opposing debate.⁷⁴ Reed stated that Thompson's intellect, character, integrity, and "deep commitment to fairness and to justice"⁷⁵ made her a pathbreaker, and Whitehouse urged that she had "scrupulously adhered to the proper role of a judge" while respecting precedent and decisions by the legislature as the people's voice.⁷⁶

II. CRITICAL EVALUATION OF THE SELECTION PROCESS

A. *Positive Aspects*

Judge Thompson's confirmation reflects numerous positive phenomena. Obama made an historic appointment of a very qualified jurist. Early and ongoing presidential consultation with the Rhode Island Senators, those lawmakers' avid support, significant cooperation among the Senators of both parties, as well as the expeditious panel hearing, ballot, and Senate vote prompted a talented individual's confirmation. For example, no Republican attended the hearing or voiced opposition in committee or on the floor, apparently because the jurist was capable and uncontroversial.⁷⁷ These actions seemed to cabin the gamesmanship and paybacks, which have long stalled appointments and delayed many Obama nominees, while enhancing respect for the process, the Executive, the Senate, and the judiciary.⁷⁸ Obama also felicitously calibrated priorities by emphasizing appellate over district court vacancies – in light of their relative significance – and especially with regard to the empty First Circuit position, given the duration of the vacancy and the appellate tribunal's small judicial complement.⁷⁹

Appointing present jurists, like Judge Thompson, provides multiple benefits. Sitting judges have experience with the substantial responsibility to address large dockets. Sitting jurists compile records to which the administration, the FBI, the Senate, the American Bar Association, and citizens have direct and easy access. The ABA can use this information to better evaluate nominees, and has done so to rate most Obama nominees as well qualified.⁸⁰

⁷³ 156 CONG. REC. S1649, S1649-52 (daily ed. Mar. 17, 2010) (statements of Sen. Reed and Whitehouse); *id.* at S1649-52.

⁷⁴ *Id.* at S1649 (statement of Sen. Leahy) (stating that Thompson's nomination was reported to the Senate without opposition).

⁷⁵ *Id.* at 1651; *see also* Mulligan, *supra* note 63.

⁷⁶ 156 CONG. REC. at S1651 (daily ed. Mar. 17, 2010) (statement of Sen. Whitehouse); *see also* Mulligan, *supra* note 63.

⁷⁷ *See supra* notes 65, 71-76 and accompanying text.

⁷⁸ Tobias, *supra* note 1, at 772-76; *see also* 156 CONG. REC. S904 (daily ed. Mar. 2, 2010) (statement of Sen. Leahy).

⁷⁹ Its six judges are the nation's fewest, magnifying one vacancy's importance. *See* 28 U.S.C. § 44 (2006).

⁸⁰ *See supra* notes 33-37 and accompanying text; *see also* Tobias, *supra* note 1, at 787. *But see supra* note 58 and accompanying text.

Moreover, improving ethnic and gender diversity, as Thompson has, realizes many advantages. For instance, in addition to fulfilling their normal judicial duties, minorities and women on the appeals courts may assist colleagues to appreciate and resolve complicated questions involving issues such as economic inequality, discrimination, and abortion.⁸¹

Furthermore, some of Obama's minority and female appointees and nominees – perhaps including Judge Thompson – might enhance ideological diversity, as some of the jurists subscribe to the concepts of a living Constitution or “empathy.”⁸² Insofar as these jurists hold rather liberal perspectives,⁸³ Obama might substantiate this endeavor because he downplayed ideology and focused instead on ethnic and gender diversity,⁸⁴ while Republican Presidents appointed numerous conservative appellate judges.⁸⁵ Minorities and women also prevent ethnic, gender, and other types of

⁸¹ See Theresa M. 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); 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, 1117 (2009); Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 19-21 (2001); Madhavi McCall, *Structuring Gender's Impact: Judicial Voting Across Criminal Justice Cases*, 36 AM. POL. RES. 264, 264 (2008); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1786-87 (2005); Lauren Collins, *Number Nine: Sonia Sotomayor's High-Profile Debut*, NEW YORKER, Jan. 11, 2010, at 42; see also Mulvaney, *supra* note 69 (“State Superior Court Judge O. Rogeriee Thompson says race and gender have no bearing on the quality of one’s decision-making, but that individual life experiences lend different perspectives to any discussion.”). But see Stephen J. Choi et al., *Judging Women* 32 (U. Chi. L. & Econ., Olin Working Paper No. 483, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1479724 (“[F]emale judges do not seem to demonstrate significant differences in the types of subject areas they are interested in, at least not in any fashion obviously connected to gender.”).

⁸² See STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 31-34 (2005); JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 181-82 (2007); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1650-51 (1987). But see ANTONIN SCALIA, *Common-Law Courts in a Civil Law System*, in A MATTER OF INTERPRETATION 3, 41-44 (Amy Gutmann ed., 1997); Mulvaney, *supra* note 69; Curt Levey, *Living Constitution, R.I.P.*, NAT’L REV. ONLINE (Sept. 30, 2005), <http://www.nationalreview.com/articles/215579/living-constitution-r-i-p/curt-levey>.

⁸³ Obama apparently believes that the elected branches more felicitously institute social change than appointed judges. See Toobin, *supra* note 1. Justice Sotomayor and certain appellate and district nominees did not endorse empathy. See 156 CONG. REC. S519-20 (daily ed. Feb. 9, 2010) (statement of Sen. Sessions); Collins, *supra* note 81; *supra* notes 12-14 and accompanying text.

⁸⁴ See *supra* notes 6, 36, 44, 52-56, 81 and accompanying text; see also *supra* notes 11-14 and accompanying text.

⁸⁵ Goldman, *supra* note 1, at 6-8; Russell Wheeler, *How Might the Obama Administration Affect the U.S. Courts of Appeals?*, BROOKINGS (Mar. 18, 2009)

bias that might affect the process of justice.⁸⁶ A judiciary whose composition resembles America strengthens public confidence in the bench.⁸⁷

B. *Negative Aspects*

President Obama's efforts have been salutary in a number of ways, but there is room for improvement. One metric is expedition, as illustrated by Judge Thompson's nomination. Despite taking six months from when the Rhode Island Senators recommended the jurist to her nomination,⁸⁸ Judge Thompson's appointment was comparatively fast.⁸⁹ The appeals courts currently have seventeen vacancies, compared to fourteen the day Obama became President.⁹⁰ Although consulting with Republicans and fostering bipartisanship helped to ensure confirmation, securing input from, and coordinating with, politicians and tapping nominees devoured time.⁹¹

Greater responsibility for delayed approval may be attributed to GOP Senators, who, for example, regularly held over panel votes seven days without

http://www.brookings.edu/opinions/2009/0318_courts_wheeler.aspx. Obama's election may be a mandate to enhance balance.

⁸⁶ See, e.g., REPORT OF THE FIRST CIRCUIT TASK FORCE ON GENDER, RACE AND ETHNIC BIAS, *reprinted in* 9 B.U. PUB. INT. L.J. 173, 180 (2000); NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS, AND ETHNIC FAIRNESS: FINAL REPORT 65-66 (1997); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990).

⁸⁷ Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253-54 (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 also Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 405 (2000). For analyses urging the selection of lesbian, gay, bisexual and transgender judges, see Michael Neva, *The Servant of All: Humility, Humanity, and Judicial Diversity*, 38 GOLDEN GATE U. L. REV. 175, 192-93 (2008); William B. Rubinstein, *Queer Studies II*, 8 UCLA WOMEN'S L.J. 379, 401-02 (1998).

⁸⁸ Compare *supra* text accompanying note 50, with *supra* text accompanying note 57. Judge Davis waited two months and Judge Keenan three. Bishop, *supra* note 8; Jerry Markon, *Ex-Fairfax Judge Recommended for Appeals Court*, WASH. POST, June 3, 2009, at B02.

⁸⁹ Thompson's appointment process was the fastest. See *infra* notes 97-98 and accompanying text. Obama confirmed one Fourth Circuit member, which did not occur until November 2009, and proffered one other nominee before that month, despite the fact that the court had five vacancies. See *Judicial Nominations*, *supra* note 30. Obama has now confirmed four Fourth Circuit nominees. See *Judicial Nominations and Confirmations: 111th Congress*, U.S. SENATE JUDICIARY COMMITTEE, <http://judiciary.senate.gov/nominations/111thCongress.cfm> (last visited Jan. 12, 2011); *supra* note 17.

⁹⁰ Toobin, *supra* note 15; *Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx> (last visited Nov. 7, 2010).

⁹¹ Many used panels whose establishment and operation consumed time. See *supra* note 7 and accompanying text. Obama often consulted and deferred to politicians. For example, Rhode Island, Maryland and Virginia Senators disregarded tradition by sending one proposed nominee to the President. See *supra* notes 6, 8, 12, 50 and accompanying text.

persuasive reasons – including for Judge Thompson, who secured approval a week later.⁹² However, the primary bottleneck was the Senate floor. In 2009, six persons whom the Committee approved did not have Senate votes, and the past year was only somewhat better. Senator Reid asked Senator McConnell and his party colleagues for help yet enjoyed only nominal success.⁹³ Senate members placed secret holds on well qualified, uncontroversial prospects.⁹⁴ Democrats sought cloture once in 2009 and again in 2010 to force votes, but these actions were unprofitable because requesting cloture provoked the GOP, worsened delay by granting the GOP thirty hours of valuable floor time, and slowed votes for other nominees, such as Judge Thompson.⁹⁵

This conduct had many detrimental impacts. The activity required that nominees place their careers on hold, dissuaded superb persons from entertaining judicial service, deprived tribunals of already-strained judicial resources, prolonged the confirmation wars, and reduced public respect for the three branches and the appointment process in general.

This Administration's first year witnessed fewer circuit appointments than the last four presidencies.⁹⁶ Thompson's confirmation was relatively quick: 162 days from nomination to appointment and 55 between committee approval and confirmation.⁹⁷ Most Obama nominees, however, experienced a much slower process: on average, 260 days from nomination to confirmation and 173 between panel and floor approval.⁹⁸ Nine remain waiting for confirmation.⁹⁹

⁹² See *supra* note 17 and accompanying text; see also *infra* notes 136-137 and accompanying text.

⁹³ McConnell would not agree to allow votes on nominees prior to Sotomayor's confirmation and entered few time accords, so the initial circuit judge's appointment was delayed until September. See *supra* note 18 and accompanying text. Similar phenomena attended Kagan's nomination process, although some judges were approved. See *Judicial Nominations and Confirmations*, *supra* note 89.

⁹⁴ Well qualified, uncontroversial nominees have rarely received secret holds. See Oliphant, *supra* note 12; *supra* text accompanying note 23. The GOP also sought much floor debate time but ultimately used little of it. See *supra* note 20 and accompanying text; see also Ackerman Letter, *supra* note 9.

⁹⁵ See *supra* notes 23-29 and accompanying text; see also Standing Rules of the Senate, R. XXII, reprinted in S. Doc. No. 106-15, at 15-17 (2000), available at <http://rules.senate.gov/public/index.cfm?p=RuleXXII>.

⁹⁶ Appeals and district court appointments were the lowest in fifty years. 156 CONG. REC. S904 (daily ed. Mar. 2, 2010) (statement of Sen. Leahy); Fontana, *supra* note 24; see also Tobias, *supra* note 1, at 781-82 (comparing first year numbers of Presidents Clinton and Bush).

⁹⁷ See *supra* notes 50, 71, 73 and accompanying text.

⁹⁸ RUSSELL WHEELER, JUDICIAL NOMINATIONS AND CONFIRMATIONS IN THE 111TH SENATE AND WHAT TO LOOK FOR IN THE 112TH, at 9 (Brookings Institution 2011), available at http://www.brookings.edu/~media/Files/rc/papers/2011/0104_judicial_nominations_wheeler/0104_judicial_nominations_wheeler.pdf; *Judicial Nominations and Confirmations*, *supra* note 89; see also 156 CONG. REC. S6012 (daily ed. July 20, 2010) (Statement of Sen.

Phenomena over which the Administration and the Senate lacked great control might explain the delay. Illustrations include filling two Supreme Court vacancies, which required three months (during which appellate recruitment efforts were basically halted), the “start-up” costs of instituting a government as well as effectively treating the recession and two wars.¹⁰⁰

Furthermore, although the appointment of sitting jurists, including Judge Thompson, has benefits, particularly regarding experience, it may also have disadvantages. For instance, critics – namely Justice Antonin Scalia – contest assimilating the bench to a “career judiciary” like that in most European nations.¹⁰¹ Opponents principally rely on the American convention, which draws judges from multiple sources that provide a broad spectrum of viewpoints and expertise.¹⁰² A few think that the jurists’ interest in elevation compromises judicial independence or their appointment may lead to excessive bureaucratization.¹⁰³

Critics of Obama’s process also focus on related qualities of prospective jurists. Several focus on the nominees’ relative age – as only one was forty and the average nominee age was fifty-four – arguing that success in

Leahy). *But see id.* at S6484 (daily ed. July 29, 2010) (statement of Sen. Sessions) (“President Obama’s circuit court nominees have waited for a hearing only 59 days, on average. President Bush’s nominees waited, on average, 176 days to even have a hearing in the committee.”).

⁹⁹ Stranch waited thirteen months, while Fourth Circuit nominees Diaz and Wynn waited thirteen and nine months, respectively. *Judicial Nominations*, *supra* note 30; *see also* David G. Savage, *Senate Fight over Judges Is Like Family Feud*, L.A. TIMES, Aug. 1, 2010, at A19; Press Release, White House, Office of the Press Sec’y, President Obama Nominates Scott M. Matheson, Jr. to the United States Court of Appeals for the Tenth Circuit (Mar. 3, 2009), available at <http://www.whitehouse.gov/the-press-office/president-obama-nominates-scott-m-matheson-jr-united-states-court-appeals-tenth-cir>; Barbara Barrett, *Senate Approves Wynn for Fourth Circuit, Diaz Still Waits*, MCCLATCHY (Aug. 6, 2010), <http://www.mcclatchydc.com/2010/08/06/98731/senate-approves-wynn-for-fourth.html>; Carl Tobias, *Time to Confirm Jane Branstetter Stranch for Sixth Circuit*, MCCLATCHY (July 23, 2010), <http://www.mcclatchydc.com/2010/07/23/97969/commentary-time-to-confirm-jane.html>

¹⁰⁰ Tobias, *supra* note 1, at 783-84.

¹⁰¹ For analysis of issues surrounding a “career judiciary,” *see supra* note 35; *see also* Russell Wheeler, *Changing Backgrounds of U.S. District Judges: Likely Causes and Possible Implications*, 93 JUDICATURE 140, 143 (2010); Ashby Jones, *Scalia in Mississippi: Stop With the Judges Already!*, WALL. ST. J. L. BLOG (Jan. 5, 2010, 1:37 PM), <http://blogs.wsj.com/law/2010/01/05/scalia-in-mississippi-stop-with-the-judges-already/>.

¹⁰² They encompass private practice attorneys, plaintiffs’ and defense lawyers, prosecutors and public defenders, and legal scholars. *See Wheeler, supra* note 35, at 7-8. Because most Obama picks are judges they will not enhance the bench’s experiential diversity.

¹⁰³ JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS 1-19* (2002); Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1443 (1983); *see also* POSNER, *supra* note 9, at 139-59.

appointing young circuit judges affords longevity on the tribunals and experienced jurists to fill Supreme Court vacancies.¹⁰⁴ Some emphasize the nominees' liberal or conservative ideological perspectives, suggesting their preference for ideologically moderate judges, while others argue for greater balance of competing ideologies.¹⁰⁵ A few urge that Republican delay even of consensus aspirants, like Judge Thompson, suggests that compromise on ideology is an unproductive approach.¹⁰⁶

In sum, the account of Judge Thompson's process shows that it resembles the process for most Obama nominees. Most nominees are very competent, diverse judges, who received nomination, albeit belatedly, after much diligent White House consultation with home state politicians. Moreover, the nominees were generally uncontroversial and earned well qualified ABA rankings.¹⁰⁷ However, Judge Thompson differs in a few respects. Her confirmation did proceed more quickly, and her ABA rating was lower than some prior Obama nominees. The account also finds that the White House and the Senate invoked many policies which fostered chamber scrutiny but caused talented, uncontroversial persons to encounter delay. The final Part of this Essay, thus, reviews ideas, extracted partly from Judge Thompson's selection process, to facilitate appointments.

III. SUGGESTIONS FOR EXPEDITIOUSLY FILLING THE OPENINGS

A. *Ideas Derived from Judge Thompson's Process*

Judge Thompson's swift confirmation is instructive. Nominees' attributes are essential. Submitting prospects of balanced temperament, who are intelligent, ethical, diligent, independent, and diverse, and who secure high ABA ratings and lack controversy expedites the process. For instance, Judge

¹⁰⁴ Fontana & Schwartzman, *supra* note 34; George, *supra* note 81, at 16-18; *supra* notes 36, 44. Judge Thompson was fifty-eight when nominated and confirmed. *O. Rogerie Thompson - CONFIRMED*, ALLIANCE FOR JUSTICE, <http://www.afj.org/judicialselection/nominees/o-rogeriee-thompson.html> (last visited Nov. 11, 2010). Professor Goodwin Liu was thirty-nine when nominated. ALLIANCE FOR JUSTICE, NINTH CIRCUIT COURT OF APPEALS NOMINEE GOODWIN LIU (2010), available at <http://www.afj.org/judicial-selection/nominees/goodwin-liu-report-final.pdf>.

¹⁰⁵ *E.g.*, Fontana, *supra* note 24; Ifill, *supra* note 87; *supra* text accompanying notes 82-85.

¹⁰⁶ GOP Presidents have aggressively named a plethora of conservative nominees. See Carl Tobias, *Dear President Bush: Leaving a Legacy on the Federal Bench*, 42 U. RICH. L. REV. 1041, 1045 (2008); Oliphant, *supra* note 12; Charlie Savage, *Appeals Courts Pushed to Right by Bush Choices*, N.Y. TIMES, Oct. 29, 2008, at A1; *supra* text accompanying note 72. Some claim that ethnic and gender diversity undercuts merit and other forms of diversity, notions that the "Wise Latina" controversy ostensibly demonstrates. *E.g.*, Sonia Sotomayor, *A Latina Judge's Voice*, 13 LA RAZA L.J. 87, 90-91 (2002); see also Collins, *supra* note 81; *supra* note 13.

¹⁰⁷ Tobias, *supra* note 1, at 780-81; Tobias, *supra* note 6.

Thompson was apparently deemed so competent and uncontroversial that Republicans failed to even attend the hearing or oppose her in panel or floor debates and votes. Her nomination also illustrates the value of early consultation with home state Senators and the importance of their strong endorsements. Transparency and ongoing communication among the home state Senators and other members of both parties is also critical. Swiftly consulting with Senators Reed and Whitehouse, while instituting a procedure to survey prospects and speedily proffering Judge Thompson expedited matters. The lawmakers' insistent, avid support thereafter further propelled her nomination and smooth confirmation. For example, when the ABA assigned Thompson a mixed ranking, the Senators immediately, directly, and efficaciously responded in ways that diminished the rating's potential force.¹⁰⁸ The Senators also orchestrated a prompt hearing in addition to swift committee and floor debates and votes.

B. *The Executive Branch and the Senate*

Obama and both parties' Senators adopted effective practices and must continue applying them and other helpful devices to the selection of judicial nominees.¹⁰⁹ The Administration and many legislators constructively addressed politicization by depoliticizing the appointment process and forwarding Judge Thompson.¹¹⁰ Lawmakers from states that had vacancies, particularly Rhode Island, coordinated with Obama and their colleagues on a few issues and assumed important responsibility to propose candidates.¹¹¹ When seats opened, most proffered several talented and diverse prospects.¹¹² Unlike Rhode Island, numerous states used commissions to make suggestions, which apparently slowed the process. Therefore, elected officials might explore the previously applied processes and, should these prove instructive,

¹⁰⁸ The Senators contested the ABA ranking, asserted that the Bar Association prefers certain prospects and lacks local knowledge, and invoked Sessions's idea that ABA ratings are not dispositive. *See supra* notes 60-63 and accompanying text. However, ratings are useful and senators have long given them serious weight. The GOP has disparaged the rankings as Democrats' "gold standard," criticizing their validity in GOP administrations. 156 CONG. REC. S5836 (daily ed. July 14, 2010) (statement of Sen. Mitch McConnell); *see also* Tobias, *supra* note 1, at 774.

¹⁰⁹ The best solution might be sufficient new posts to confirm all of the judges now authorized by Congress. Tobias, *supra* note 1, at 784 n.92. For other remedies, see Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 552-73 (1998).

¹¹⁰ *See supra* notes 12-14 and accompanying text; *supra* notes 2-10 and accompanying text. Obama and Senators attempted to cooperate, resolve opposing views, anticipate controversies, treat conflicts, and halt or reduce unproductive conduct. *E.g.*, *supra* notes 7, 16 and accompanying text; *see* Toobin, *supra* note 1.

¹¹¹ *See supra* notes 7-8 and accompanying text.

¹¹² *See supra* notes 8, 33, 36 and accompanying text. *But see supra* notes 7, 91 and accompanying text.

refine their efforts.¹¹³ The selection commissions can improve endeavors in tribunals with several vacancies and counter gridlock, as they enhance consensus.¹¹⁴ Another concrete approach could be congressional authorization of new judgeships, but this will only be useful if the Senate ends the judicial selection impasse.¹¹⁵

Notwithstanding the benefits examined, the process has been less than fully successful. Accordingly, the White House and political figures may wish to canvass the strategies they implemented, reform or discard less efficacious practices, as indicated, assess salutary remedies deployed earlier, and consider and perhaps apply innovative, untested concepts.

C. *The Executive Branch*

The new White House espoused broad goals and crafted valuable ways to achieve them. The administration should proceed as it began.¹¹⁶ Obama stressed merit as the touchstone, choosing very skilled, diverse persons, like Judge Thompson, and streamlined the procedures by reestablishing advance ABA diagnosis that facilitates consideration.¹¹⁷ His administration should continue assuming lead responsibility for the nomination process while seeking advice from home state officers and pursuing assistance from cooperative GOP Senators,¹¹⁸ elevating judges and anticipating Supreme Court resignations.¹¹⁹

¹¹³ Examples are groups that California Senators Dianne Feinstein (D) and Barbara Boxer (D) and the Wisconsin Senators have long used, which may increase transparency and protect privacy. See *supra* note 7.

¹¹⁴ If the above concepts are ineffective, Obama and senators must redouble endeavors to stop logjams. See Mark Hansen, *Politicians Can't Agree Who Should Fill Vacancies on the Nation's Most Reliably Conservative Appellate Court*, A.B.A. J., June 2008, at 38, 39-43. Rather drastic notions, such as "trades," may warrant use.

¹¹⁵ E.g., *supra* text accompanying notes 18-29; see also Tobias *supra* note 1, at 773-76. The Judicial Conference has suggested approval of twelve judgeships. Because the courts' policymaking arm bases its recommendations on conservative estimates of dockets and workloads, and the courts need the posts to deliver justice, Obama and Congress should adopt a bill. See Tobias, *supra* note 1, at 790; see also Federal Judgeship Act of 2009, S.1653, 111th Cong. (2009); U.S. JUDICIAL CONFERENCE, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 22 (Mar. 17, 2009); Carl Tobias, *The Federal Appellate Court Appointments Conundrum*, 2005 UTAH L. REV. 743, 748.

¹¹⁶ Obama may reexamine and reform his ideas, assess prior and new ones, and announce his objectives in a national venue to enhance transparency and inform selection participants and the public. Tobias, *supra* note 106, at 1049 (recommending the same strategies to Bush when he was in office).

¹¹⁷ See *supra* notes 4, 5, 33, 36 and accompanying text; see also Tobias, *supra* note 1, at 772, 774.

¹¹⁸ The Senators' votes on judges reflect many of these ideas. See *supra* notes 19-29 and accompanying text; see also Barnes, *supra* note 13; David Stout, *Sotomayor Gets 9 GOP Votes*, N.Y. TIMES - THE CAUCUS (Aug. 6, 2009, 12:56 PM), <http://thecaucus.blogs.nytimes.com/2009/08/06/sotomayor-gets-9-gop-votes/>.

Obama must ensure that he provides sufficient, able, diverse nominees whom the panel can scrutinize at a pace that sustains efficient processing,¹²⁰ and continue working actively with the Democratic leadership and their Republican counterparts.¹²¹

Obama made special efforts to increase ethnic and gender diversity, reflected by his appointees and nominees,¹²² and must continue improving those forms of diversity¹²³ because they yield the advantages recounted.¹²⁴ As discussed, nominees who increase ethnic and gender diversity could also enhance ideological diversity.¹²⁵ The Obama Administration should analyze expanding ideological diversity because GOP Presidents named many conservative judges and additional balance seems warranted.¹²⁶ Obama could enjoy success because he has already countered assertions that his prospects are liberal by forwarding centrists, such as Judge Thompson,¹²⁷ and other people whom Republicans favor, namely Judges Martin and Stranch, supported by the Georgia and Tennessee lawmakers.¹²⁸ He similarly ought to consider increasing diversity in experience and age.¹²⁹

The White House needs to keep using modest, nuanced policies, as missteps will undercut credibility and slow appointments. Obama, whose polestar is

¹¹⁹ See Jeffrey Toobin, *After Stevens*, NEW YORKER, Mar. 22, 2010, at 39; *supra* notes 32-43.

¹²⁰ Kendall, *supra* note 2; see also 156 CONG. REC. S904 (daily ed. Mar. 2, 2010) (statement of Sen. Leahy); Ackerman Letter, *supra* note 9.

¹²¹ See *supra* notes 15-17 and accompanying text. *But see supra* notes 19-29 and accompanying text.

¹²² *Supra* text accompanying notes 6, 8, 36; see also Goldman, *supra* note 1, at 1 (offering records since Nixon).

¹²³ He may review and refine his ideas and assess effective prior ones. See Tobias, *supra* note 1, at 788.

¹²⁴ See *supra* notes 81 and accompanying text. *But see supra* note 106.

¹²⁵ See *supra* notes 82-87 and accompanying text; see also *supra* note 106 and accompanying text.

¹²⁶ See *supra* notes 85, 106 and accompanying text.

¹²⁷ Insofar as Obama's choices spark interest group criticism or partisan criticism that delays selection and promotes rejections, Obama may assess moderate picks or be practical about the effect of such opposition. Bush experienced these phenomena. Neil A. Lewis, *Bush Judicial Choice Imperiled by Refusal to Release Papers*, N.Y. TIMES, Sept. 27, 2002, at A28; see also NANCY SCHERER, SCORING POINTS 4-8 (2005).

¹²⁸ Rankin, *supra* note 20; Tobias, *supra* note 99. Obama may assess more Bush appointees like Justice Sotomayor and able GOP lawyers. See Neil A. Lewis, *After Delay, Senate Approves Judge for Court in New York*, N.Y. TIMES, Oct. 3, 1998, at B2; see also Tobias, *supra* note 115, at 770.

¹²⁹ For example, Obama could tap more practitioners, academics, and young prospects. See Shear, *supra* note 9; Carol J. Williams, *A Big Legal Resume, Getting Bigger*, L.A. TIMES, Mar. 9, 2010, at AA1; *supra* notes 33-37, 102-104 and accompanying text.

bipartisanship, should continue applying cooperative ideas.¹³⁰ Only when this approach lacks efficacy because, for instance, Republicans do not cooperate, should Obama adopt relatively confrontational alternatives. For example, if the Republican Party stalls more floor votes, Obama could use his bully pulpit to embarrass the GOP or hold it responsible, force the issue by taking the selection problems to the nation, or treat vacancies as an election matter.¹³¹ Additional means include nominating candidates to all existing, unoccupied circuit positions or the careful deployment of recess appointments. Both techniques leverage Republican support through publicizing or dramatizing how systematic opposition to filling empty posts undermines justice.¹³²

D. *The Senate*

The Senate should engage in conciliatory practices, as the body has some responsibility for the current unproductive dynamics and the judicial vacancies. The GOP ought to remember that Democrats helped approve more judges when Republicans occupied the White House,¹³³ and that the public will blame the GOP for numerous prolonged openings.¹³⁴ Republicans, thus, should cooperate and provide candid advice when consulted; participate in thorough debates rather than filibuster; swiftly approve capable, moderate nominees, such as Judge Thompson and Bush appointees Obama proposes to elevate; and suggest talented alternative prospects when they find Obama's unacceptable.¹³⁵

¹³⁰ Obama's cooperative ideas are usually effective. For example, by aggressively consulting elected officials, Obama was able to nominate well qualified, consensus candidates. This is exemplified by Judge Thompson, whose skills, moderate perspectives, and diversity suggest why she easily won confirmation.

¹³¹ Sheryl Gay Stolberg, *Obama Says Nation Can't Afford the Politics of No*, N.Y. TIMES, Jan. 28, 2010, at A1; David Ingram, *Obama Pushes Confirmation of Judges*, BLT (July 7, 2010, 3:19 PM), <http://legaltimes.typepad.com/blt/2010/07/obama-pushes-confirmation-of-judges.html>. The GOP and Bush capitalized on the latter idea. See, e.g., Tobias, *supra* note 115, at 772.

¹³² Obama should not employ recess appointments. See U.S. CONST. art. II, § 2, cl. 3. Numerous legal, practical and political difficulties explain their rare use. See *Evans v. Stephens*, 387 F.3d 1220, 1223, 1227 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) ("A recess appointee lacks life tenure and is not protected from salary diminution. As a result, such an appointee is in theory subject to greater political pressure than a judge whose nomination has been confirmed."); William T. Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515, 552 (2004). Some analogous ideas that Bush used to press Democrats lacked efficacy. E.g., Tobias, *supra* note 106, at 1052-53.

¹³³ Tobias, *supra* note 115, at 756-57. But see Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL'Y 1032, 1037 (2009).

¹³⁴ See Tobias, *supra* note 1, at 775; Jack Newfield, *The Right's Judicial Juggernaut*, NATION, Oct. 7, 2002, at 11 (blaming controversial Republican nominations for delays).

¹³⁵ Bush and others suggested ways to expedite the process, but some methods, such as

The Judiciary Committee has minimally slowed appointments, but the GOP could deploy holds less frequently and reserve them for highly problematic questions. If even this creates delay, lawmakers have a number of solutions to expedite review. The committee might increase votes with succinct assessments or perfunctory hearings, like Judge Thompson's, or end hearings for noncontroversial designees.¹³⁶ Some Senate conventions and recent practices demonstrate that all nominees deserve hearings and ballots.¹³⁷

Limited floor debates and votes explain the dearth of appointments. For instance, Senator Reid could promote action by scheduling consideration more promptly after committee approval. To the extent controversy over nominees allows them to languish, Democrats should reduce filibuster deployment through enhanced, rigorous debates.¹³⁸ For his part, Senator McConnell needs to be more flexible in setting time concords and ask that GOP colleagues use holds less reflexively, especially for consensus prospects. If Senator McConnell lacks receptivity, Democrats should hold his party accountable. Senator Leahy has urged that every nominee whom the Committee reports absent dissent should be given immediate floor consideration and those with opposition should receive time agreements for debates.¹³⁹ Insofar as the delay

requiring judges to provide earlier notice of their intention to take senior status and rigid timelines for particular stages, are impractical or violate conventions. *See* Exec. Order No. 13,300, 68 Fed. Reg. 25,807 (May 9, 2003) (stating that the President shall submit judicial nominations to the Senate within 180 days of receiving notice of a vacancy or pending retirement); *see also* S. Res. 327, 108th Cong. (2004) (requiring Judiciary Committee Chair to create a confirmation timetable that grants nominees hearings within thirty days of nomination); Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 334 (1994).

¹³⁶ The GOP used the first idea to expedite the process. Helen Dewar, *Republicans Push Speedy Action on Court Picks*, WASH. POST, Jan. 30, 2003, at A07; Neil A. Lewis, *G.O.P. Links Judicial Nominees to Thwart Opponents*, N.Y. TIMES, Jan. 30, 2003, at A21; *see also* Tobias, *supra* note 115, at 766, 774.

¹³⁷ Ideological concerns have caused delay. Tobias, *supra* note 115, at 764-65, 774-75; *see also* Michael J. Gerhardt, *Merit v. Ideology*, 26 CARDOZO L. REV. 353, 369 (2005); *infra* text accompanying notes 138-147 (suggesting ways to counter ideologically based delays).

¹³⁸ These debates can be useful exchanges. *See* 148 CONG. REC. S7651 (daily ed. July 31, 2002) (statement of Sen. Leahy); 143 CONG. REC. S2515 (daily ed. Mar. 19, 1997) (statements of Sen. Hatch and Sen. Leahy) (agreeing on the nomination of Judge Garland, notwithstanding other delays).

Two filibuster attempts failed. *See supra* notes 23-29. If the GOP uses more filibusters, this might warrant reinstatement of a group like the "Gang of 14," which formed to restrict filibusters and oppose their abrogation. *See Text of Senate Compromise on Nominations of Judges*, N.Y. TIMES, May 24, 2005, at A18; *see also* Lincoln D. Chafee, *Ban Filibuster Abuse for Good of All*, POLITICO (Feb. 26, 2010), <http://www.politico.com/news/stories/0210/33530.html>; *infra* note 147.

¹³⁹ These concepts may be impractical in light of the present hyper-partisan climate. *See* 156 CONG. REC. S904 (daily ed. Mar. 2, 2010) (statement of Sen. Leahy); *supra* text accompanying notes 23-29; *supra* note 135 (discussing unrealistic ideas that Bush

and rather minuscule number of confirmations indicates GOP recalcitrance meant to undercut the Obama Administration or payback for somewhat prompt appointment of two Justices or for Democratic stalling of Bush nominees, the Senate's current Democratic majority could assess, and perhaps employ, concepts like the comparatively aggressive ideas discussed earlier.¹⁴⁰

In the final analysis, the chamber must balance the need for assiduous scrutiny with filling the multitude of vacancies and confirmable nominees. Both parties should question whether they emphasize ideology too much.¹⁴¹ Each party apparently finds that the other restricted its President's selections due to concerns regarding the nominees' political views.¹⁴² Article II envisions that members will investigate skills, character, and temperament.¹⁴³ The language of Article II cannot sustain delay based on how nominees will resolve particular appeals because this may detrimentally affect judicial independence.¹⁴⁴ As Senator Sessions has recently contended, a few decisions or lines in speeches must not ban prospects from appointment.¹⁴⁵ Just as

espoused).

¹⁴⁰ *Supra* notes 32, 40, 131-132 and accompanying text; *see also* Tobias, *supra* note 1, at 774.

¹⁴¹ Both must concomitantly eschew fruitless efforts to detect whether nominees would be "judicial activists." *See Should Ideology Matter? Judicial Nominations 2001: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 107th Cong. (2001) (statements of Prof. Stephen B. Presser and Prof. Cass Sunstein), *reprinted in* 50 *DRAKE L. REV.* 429, 453-73 (2002) [hereinafter *2001 Hearing*] (arguing against liberal and conservative "judicial activism" respectively, illustrating that "these political terms of exhortation obscure rather than illuminate what is at stake when judicial appointments are being discussed"); *Judicial Activism: Assessing the Impact: Hearing Before the Subcomm. on The Const. of the Senate Comm. on the Judiciary*, 105th Cong. (1997); 143 *CONG. REC.* S2515 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch); KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM 2* (2006) ("To agree that activism is bad means nothing if [senators] cannot also agree on what counts as activism.").

¹⁴² *E.g.*, Goldman et al., *supra* note 4, at 256; *see also* Tobias, *supra* note 1, at 773-76; Oliphant, *supra* note 12.

¹⁴³ *2001 Hearing*, *supra* note 141, at 464; Stephen L. Carter, *A Devilish Look at the Confirmation Process (With Apologies to C.S. Lewis)*, 50 *DRAKE L. REV.* 369, 387 (2002); Gerhardt, *supra* note 137; Ed Gillespie, *Judging Obama's Nominee*, *WASH. POST*, May 20, 2009, at A23; Douglas Laycock, *Forging Ideological Compromise*, *N.Y. TIMES*, Sept. 18, 2002, at A31.

¹⁴⁴ *CITIZENS FOR INDEPENDENT COURTS, UNCERTAIN JUSTICE* 1-75, 205-42 (2000); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 *S. CAL. L. REV.* 315, 315-16 (1999).

¹⁴⁵ *See* Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary (Jan. 28, 2010) (statement of Sen. Sessions), *available at* <http://judiciary.senate.gov/hearings/hearing.cfm?id=4352>; Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary (Feb. 4, 2010) (statements of Sen. Feingold & Feinstein), *available at* <http://judiciary.senate.gov/hearings/hearing.cfm?id=4379>. *But see* Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary (Feb. 4, 2010) (statements of Sen. Kyl

participation in Federalist Society activities halted few Bush candidates, ACLU endeavors should infrequently operate as a selection bar.¹⁴⁶ A practical solution could be a presumption that very qualified, mainstream nominees secure appointment or at least receive up or down votes.¹⁴⁷

CONCLUSION

President Obama's appointment of Judge O. Rogeriee Thompson was historic and yields valuable insights on facilitating judicial selection. President Obama diligently reinstated bipartisanship and limited politicization, especially with consultation and the appointment of qualified, moderate, diverse nominees, typified by Judge Thompson. Nevertheless, confirmation has been less prompt than is optimal. The Administration should capitalize on the process used to confirm Judge Thompson, which provides a valuable template. Senators must be responsive to the President's importuning and cooperate with him and other lawmakers to decrease vacancies. Republicans and Democrats should remember that both have fostered, and ought to jettison, troubling Senate floor dynamics – or citizens will hold them accountable.

& Sen. Sessions), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4379>.

¹⁴⁶ Ackerman Letter, *supra* note 9; Jason DeParle, *Nomination for Supreme Court Stirs Debate on Influence of Federalist Society*, N.Y. TIMES, Aug. 1, 2005, at A12; Savage, *supra* note 106. *But see* Tobias, *supra* note 115, at 766-67; Jonathan H. Adler, *Judge Goodwin Liu?*, VOLOKH CONSPIRACY (Jan. 21, 2010, 11:03 AM), <http://volokh.com/2010/01/21/judge-goodwin-liu/#contact>.

¹⁴⁷ This idea suggests why ten Republicans favored cloture on Judge Hamilton, even as nine voted against his confirmation and others voted to confirm Sotomayor and Kagan. *See* Dana Milbank, *One of These Senators is Not Like the Others*, WASH. POST, July 21, 2010, at A02; *supra* notes 24-29, 118, 139 and accompanying text. The future of selection and the Senate is unclear. Carl Hulse, *Change Comes to a Place that Doesn't Care for it*, N.Y. TIMES, July 24, 2010, at A8; George Packer, *The Empty Chamber*, NEW YORKER, Aug. 9, 2010, at 38; *see also* JOHN ROBERTS, YEAR-END REPORT ON THE FEDERAL JUDICIARY 7-8 (2010); Evan Bayh, *Why I'm Leaving the Senate*, N.Y. TIMES, Feb. 21, 2010, at WK9; Stephen Dinan, *B-word Stymies Both Sides of the Aisle*, WASH. TIMES, Mar. 1, 2010, at A1; E.J. Dionne Jr., *Living With Partisanship*, WASH. POST, Mar. 1, 2010, at A21; George F. Will, *When the Filibuster is the Enemy*, WASH. POST, Feb. 25, 2010, at A23.