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Laying the Foundation: How President Obama's Judicial Nominations Have Paved the Way for a More Diverse Supreme Court

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ESSAY

Laying the Foundation: How President Obama’s Judicial Nominations Have Paved the Way for a More Diverse Supreme Court

APRIL G. DAWSON*

INTRODUCTION

The United States Supreme Court has seen significant changes in its makeup in the past 50 years. While the Court historically has been a white male, protestant institution, it is currently made up of five men, three women, five Catholics, three Jews, one African American, and one Latina. President Obama can take credit for a significant portion of the current diversity of the Court, having appointed two of the three female Justices currently on the bench, and having appointed the first Latina Justice. In addition to having made a direct impact on the diversity of the current Court, President Obama may have also made an impact on the diversity of the Supreme Court in the future.

Increasingly, Supreme Court Justices are being selected from the ranks of federal appellate judges. Thus, if the federal appellate bench is diverse, it increases the likelihood that future presidents will select diverse Supreme Court nominees. This Essay will review President Obama’s judicial appointments to the federal appellate and district courts to determine if he increased the diversity of the federal courts

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in a meaningful way and thereby laid the foundation for a more diverse Supreme Court.

Part I of this essay briefly discusses the relatively new trend of presidents selecting federal appellate judges for Supreme Court nominees. Before examining President Obama's federal court of appeals judicial appointments, Part II addresses the obstructionist response by Congress to President Obama's presidency, and provides context for the discussion of President Obama's judicial nominations. Part III examines President Obama's federal appellate judicial appointees by comparing the diversity of his selections with the diversity of the appellate judge selections of President Obama's five most recent predecessors. Part IV examines President Obama's federal district judge appointees, and likewise, compares the diversity of President Obama's federal trial court judicial appointments with the diversity of the selections made by the five previous presidents. The Conclusion reflects on the likelihood that a future president will select one or more of President Obama's lower court diverse appointees to serve on the U.S. Supreme Court.

I. Supreme Court Justice Nominee Pool

The first step in determining whether President Obama took steps during his tenure in office to improve the diversity of the future Supreme Court is to consider the most likely pool from which Supreme Court nominees will be selected. Historically, presidents have selected individuals to be nominated for the High Court from a variety of legal and political professions. Past presidents have nominated politicians, academics, government attorneys, private attorneys, and judges. While one would assume that most Supreme Court nominees have been judges, historically, that has not been the case. From 1901 through 1966, only 28% of the new nominees were current or previous federal appellate judges. During this time period there were 39 new individuals who were nominated to serve on the Supreme Court. Of that number, 11, or 28%, were current or previous federal appellate judges when nominated. Sixteen of the 39, or 41%, had prior judicial experience at either the federal appellate, federal district or state court level. (Edward Douglass White, Charles Evan Hughes, and Harlan Fiske Stone were all nominated to the position of Chief Justice during this

2. See generally id.
4. During this time period there were 39 new individuals who were nominated to serve on the Supreme Court. Of that number, 11, or 28%, were current or previous federal appellate judges when nominated. Sixteen of the 39, or 41%, had prior judicial experience at either the federal appellate, federal district or state court level. (Edward Douglass White, Charles Evan Hughes, and Harlan Fiske Stone were all nominated to the position of Chief Justice during this
nominees have increasingly been current federal court of appeals judges. From 1967 to the present, 77% of the nominees were former or current federal appellate judges. Since 1986, fourteen individuals have been nominated to serve on the Supreme Court. Of that number, only two were not federal judges, and of those two, only one of them was confirmed. Underscoring this trend was President Obama’s nomination of Merrick Garland, chief judge of the D.C. Circuit, to fill the vacancy on the Supreme Court left following Justice Scalia’s death, and President Trump’s nomination of Neil Gorsuch, a judge on the Tenth Circuit, to fill the same vacancy.

So, while historically the path to a Supreme Court nomination was varied and nominees were selected from a variety of legal professions, today the road is narrow and the pool is small. As a result, presidents are playing an increasingly important role in the composition of the Supreme Court to be formed even after they leave office through their lower federal court appointments. Thus, a president’s Supreme Court legacy can go beyond direct appointments to the High Court.

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5. See April G. Dawson, Missing in Action: The Absence of Potential African American Female Supreme Court Justice Nominees – Why This Is, and What Can Be Done About It, 60 How. L.J. 177, 190 (2016) (noting that between 1967 and 2017 there were 22 new nominees to the Supreme Court and that, of that number, only 5 were not current or previous federal judges when nominated).


7. See Dawson, supra note 5, at 191 (noting that the two non-judge Supreme Court nominees nominated between 1967 and 2017 were Harriet Miers and Elena Kagan, and that, of the two, only Kagan was confirmed).


11. For example, although Jimmy Carter did not make any appointments to the Supreme Court, in 1980 he appointed Ruth Bader Ginsburg to the D.C. Circuit Court of Appeals and Stephen Breyer to the First Circuit Court of Appeals. Had Ginsburg and Breyer not been federal appellate judges, it is unlikely they would have been nominated by Bill Clinton for appointment to the Supreme Court in 1993 and 1994, respectively. See Richard L. Berke, The Supreme Court: The Overview; Clinton Names Ruth Ginsburg, Advocate for Women, to Court, N.Y. TIMES
Before engaging in a review of President Obama's lower federal judge appointments to determine the impact he has made on the Supreme Court of the future, Part II below addresses the climate of Congressional obstructionism President Obama encountered generally, and specifically when attempting to appoint federal judges.

II. OBSTRUCTIONISM IN THE APPOINTMENT OF FEDERAL JUDGES

Article II, Section 2 of the U.S. Constitution provides that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court." This provision has been interpreted as the procedure by which a president also nominates and appoints all federal appellate and federal district judges. Thus, the "Appointments Clause" gives the president the primary power in shaping the makeup of the federal judiciary. However, that power is checked with the inclusion of the "Advice and Consent Clause," which gives the Senate final approval of a president’s judicial nominee. The Senate exercises its authority by convening the Senate Judiciary Committee, which investigates the judicial nominees, holds hearings on the nominees, takes a committee vote on the nominee, and makes a recommendation regarding confirmation to the full Senate. Following the Senate Judiciary Committee’s consideration of the nominee, the full Senate will vote. Because the Senate must act before a judicial nominee can be duly appointed and receive their commission, the Senate has the power to thwart a president’s efforts in appointing judges.

There is no clearer example of the Senate’s ability to obstruct a president’s affirmative mandate to appoint federal judges than the un-


14. Id. at 486.
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precedented decision of the Senate to refuse to hold hearings and take a vote on President Obama’s nominee to fill the vacant Supreme Court seat that resulted from the death of Justice Antonin Scalia. Following Justice Scalia’s death on February 13, 2016, the Republican leadership, less than twenty-four hours after Scalia’s death, stated that the Senate would not consider any nominee until after the November election.17 President Obama, in accordance with the Constitutional obligation that he “shall” nominate and appoint Supreme Court justices, nominated Merrick Garland on March 16, 2016, to fill Justice Scalia’s seat on the Court.18 However, Garland’s nomination languished for 293 days before the nomination lapsed on January 3, 2017.19

While the Senate’s decision to not hold a hearing and a vote on a president’s Supreme Court justice nomination was wholly unprecedented,20 the Senate’s decision to simply ignore President Obama’s nomination was a culmination of obstructionist tactics employed by Congress that dogged President Obama’s entire presidency.21 To be sure, congressional obstructionism is not uncommon when one party controls the executive branch and another controls the legislative branch.22 The party in control of Congress in such situations often

17. Sen. Mitch McConnell, Justice Antonin Scalia (Feb. 13, 2016), http://www.mcconnell.senate.gov/public/?p=PressReleases&ContentRecord_id=8E6839F9-181B-42F5-B8F0-F4244BD9727&ContentType_id=C19B7A5-2BB9-4A73-B2AB-3C15151A762B&Group_id=0fd6d1dca-6A05-4B26-8710-a0b7b59a8f1f; see 162 CONG. REC. S925, S925–26 (daily ed. Feb. 23, 2016) (statement of Sen. McConnell). The Constitution does not provide the number of justices on the Court. Rather, the Constitution gives Congress the authority to determine the structure of the federal judiciary as a whole. As a result, Congress sets the number of Supreme Court Justices. Congress originally set the number at six, with a Chief Justice and five Associate Justices, in the Judiciary Act of 1789. The number of justices was increased to seven in 1807, increased to nine in 1837, and increased to ten in 1863. The number of justices was reduced to seven in 1866. In 1869, the number was fixed at nine, where it remains today. See Jonathan K. Stubbs, A Demographic History of Federal Judicial Appointments by Sex and Race: 1789-2016, 26 BERKELEY LA RAZA L.J. 92, 97 (2016).


21. See generally William P. Marshall, Actually We Should Wait: Evaluating the Obama Administration’s Commitment to Unilateral Executive Branch Action, 2014 UTAH L. REV. 773 (2014) (finding that President Obama was faced with one of the most obstructionist Congresses in American history).


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responds to presidential action in an obstructionist manner so as to prevent presidential successes that would hinder the losing party’s chances of making headway in the next midterm and general election. However, the level of obstructionism that President Obama faced was unprecedented.

Much like the duality discussed in the context of the Garland nomination—that the obstructionism with Garland’s nomination was both unprecedented as Supreme Court nominations go and at the same time par the course for treatment of President Obama—the obstruction President Obama faced generally was also both unique and familiar. The level of congressional obstructionism President Obama faced was unique in that it far exceeded obstruction faced by any other president in modern history. While unique on the one hand, that same obstructionism was also familiar in that roadblocks have always been placed in the path of African Americans seeking to gain or exercise governmental power.

One of the clearest examples of congressional obstructionism towards African Americans appointed to positions of power in the government has been in the context of federal judicial appointments. The first African American to receive a life-tenure Article III judicial appointment was William Henry Hastie, who was nominated by President Harry Truman in 1949 to fill a position on the Third Circuit Court of Appeals. Hastie was nominated by Truman on October 15,
1949, and after no Senate action or any indication that the Senate would act, Hastie received a recess appointment from Truman on October 21, 1949. Hastie was re-nominated to the same position by Truman on January 5, 1950, but was not finally confirmed by the Senate until July 19, 1950. The delay of more than six months for Senate action on a federal appellate judge nomination was unprecedented at the time. The primary reason for the delay was the effort to block Hastie's appointment by the then-chair of the Senate Judiciary Committee, James Eastland, a devout segregationist from Mississippi.

Eastland continued his obstructionism towards African American federal appellate court nominees with his attempt to prevent the appointment of Thurgood Marshall as the second African American nominated to the federal appellate bench. In fact, the delay in Marshall's confirmation was even longer than Hastie's six-month delay, which had occurred approximately ten years earlier. Marshall was nominated by President John F. Kennedy to the United States Court of Appeals for the Second Circuit on September 23, 1961. With the Senate having taken no action and with the anticipation of a confirmation...

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29. See U.S. Const. art. II, § 2, cl. 3. Article II, Section 2, Clause 3 of the U.S. Constitution gives the president the power “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” Id.
30. Neglected Nomination, WASH. POST, July 8, 1950, at 4 (referring to “covert opposition to Judge Hastie's confirmation which finds refuge in vague allegations that he has belonged to 'subversive' organizations”); Negro Judge Confirmed, N.Y. TIMES, July 20, 1950, at 32; Senate Confirms Hastie to Seat on Appeals Court, WASH. POST, July 20, 1950, at 6.
32. WARE, supra note 27, at 236.
33. See Revesz, supra note 32, at 254 (discussing the opposition facing black circuit court judges in the Senate confirmation process).
34. See generally id. at 249 (describing the tortured course of Marshall's nomination and recess appointment and the subsequent delay, repeated hearings, threatened filibuster, and eventual, 11th-hour confirmation by the Senate).
35. Id. at 237.
tion battle, Kennedy made a recess appointment on October 5, and Marshall was sworn in on October 23, 1961.\textsuperscript{37} Kennedy resubmitted Marshall’s nomination to the Senate on January 15, 1962, but he was not confirmed until September 11, 1962, almost a year after his initial nomination.\textsuperscript{38} Meanwhile, Kennedy’s twenty other federal appellate nominees, all of whom were white men, were confirmed within three months of their nominations, with most being confirmed within one month of their nomination.\textsuperscript{39} Moreover, their confirmation hearings were all completed in a single day, while Marshall’s hearing was conducted over multiple days during a four-month period.\textsuperscript{40} The cause of the delay was again Senator Eastland’s obstructionism.\textsuperscript{41} Eastland also attempted to stall the appointment of Marshall to the U.S. Supreme Court following Lyndon B. Johnson’s June 13, 1967, nomination of Marshall to the Supreme Court seat vacated by Justice Tom Clark.\textsuperscript{42}

Two other early African American federal judicial appointees were also blocked by Eastland: A. Leon Higginbotham and Spottswood Robinson.\textsuperscript{43} Both Higginbotham and Robinson were nominated to the federal district court bench by President Kennedy in 1963.\textsuperscript{44} Higginbotham was nominated to the District Court for the Eastern District of Pennsylvania on September 25, 1963,\textsuperscript{45} and Robinson was nominated to the U.S. District Court for the District of Columbia, October 1, 1963.\textsuperscript{46} Although the other individuals nominated by Kennedy during that same time were confirmed,\textsuperscript{47} Eastland

\begin{itemize}
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id. at 238, 253.
\item \textsuperscript{39} FED. JUD. CTR., supra note 27.
\item \textsuperscript{40} See Revesz, supra note 32, at 252 (“The confirmation hearings of all nineteen of Kennedy’s other nominees were completed in a single day; in Marshall’s case, they took place over six separate days spread out over almost four months.”).
\item \textsuperscript{41} See generally id. at 247.
\item \textsuperscript{42} See Wil Haygood, Showdown: Thurgood Marshall and the Supreme Court Nomination that Changed America 18-19 (Alfred A. Knopf 2015).
\item \textsuperscript{43} See Victor Williams, NLRB v. Noel Canning Exposes Judicial Incapacity: Junior Varsity Politicians’ Foul the President’s Textual Appointment Discretion, 43 RUTGERS U. L. REC. 60, 75, 82 (2016) hereinafter Williams, Exposes Judicial Incapacity.
\item \textsuperscript{44} Id. at 75; see also OFFICIAL CONGRESSIONAL DIRECTORY FOR THE USE OF THE UNITED STATES CONGRESS: 91ST CONGRESS, 1ST SESSION 291 (U.S. GOV’T PRINTING OFFICE 1969); Unsuccessful Nominations and Recess Appointments, FED. JUD. CTR. [hereinafter CONGRESSIONAL DIRECTORY], https://www.fjc.gov/history/judges/unsuccessful-nominations-and-recess-appointments (last visited Apr. 17, 2017).
\item \textsuperscript{45} 109 CONG. REC. 24332 (1963).
\item \textsuperscript{46} CONGRESSIONAL DIRECTORY, supra note 44, at 670.
\item \textsuperscript{47} George Clifton Edwards, Jr. was nominated by John F. Kennedy on September 9, 1963, to the United States Court of Appeals for the Sixth Circuit. Edwards was confirmed by the Senate on December 16, 1963, even though Kennedy had died on November 22, 1963. Bernard
blocked the nominations of Higginbotham and Robinson, resulting in the lapse of both nominations after President Kennedy’s death on November 22, 1963. President Lyndon Johnson appointed both men as recess appointments on January 6, 1964. Johnson re-nominated both men on February 3, 1964. Higginbotham was confirmed by the Senate on March 14, 1964, and received his commission on March 17, 1964. Robinson was confirmed by the Senate on July 1, 1964, and received his commission on July 2, 1964.

Constance Baker Motley was the eighth African American, the fourth woman, and the first African American woman appointed to the federal bench. She too suffered undue delay during her confirmation process due to racial politics and the obstructionist tactics of Eastland. Motley was nominated by President Johnson on January 26, 1966, to the U.S. District Court for the Southern District of New York. However, Motley was not confirmed by the Senate until August 30, 1966. At the time of Motley’s nomination, only three other women had been appointed to the federal bench. While the nomina-


See Williams, Exposes Judicial Incapacity, supra note 43 at 75–76.

FED. JUD. CTR., supra note 27.

Higginbotham was elevated to the Third Circuit Court of Appeals by President Jimmy Carter on September 19, 1977. He was confirmed on October 7, 1977, and received his commission on October 11, 1977. Id.

Robinson was elevated to the D.C. Circuit Court of Appeals by President Johnson on October 6, 1966. He was confirmed by the Senate on October 20, 1966, and received commission on November 3, 1966. Id.


CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY 215 (1998); see also Clark, One Man’s Token, supra note 27, at 516.

FED. JUD. CTR., supra note 27.

Roisman, supra note 54. The first female federal judge was Florence Allen who was nominated by President Franklin D. Roosevelt in early March 1934 to serve on the United States Court of Appeals for the Sixth Circuit. Allen was confirmed in less than four weeks. At the time of Motley’s nomination in January 1966, Allen, the first and only female federal appellate judge, was on senior status, which she had assumed in 1959 at the age of 75. Allen died in September 1966 at the age of 82. The next two women appointed to federal judgeships were appointed to federal district courts. Burnita Shelton Matthews received a recess appointment from President Harry Truman on October 21, 1949, to fill a newly created seat on the United States District Court for the District of Columbia. She was nominated to the same position by
tions of her three white counterparts took three months or less for Senate confirmation, Motley's confirmation fight took more than seven months.\textsuperscript{58}

Consistent with this history of obstructionism, President Obama was blocked at every opportunity, particularly when it came to his executive and judicial appointments.\textsuperscript{59} And while the obstruction Obama faced may not have been masterminded by professed bigots of the likes of Eastland, race certainly played a role in efforts to thwart Obama's success.\textsuperscript{60}

\section*{III. Federal Appellate Judicial Appointees}

Notwithstanding the obstructionist tactics employed to frustrate President Obama's appointments, President Obama was able to make 55 federal appellate judge appointments.\textsuperscript{61} As discussed above, the current trend is for presidents to select Supreme Court nominees from the pool primarily comprised of federal appellate judges. Thus, it follows that if the federal appellate judiciary is diverse, there is a greater likelihood that future Supreme Court appointees will be diverse.\textsuperscript{62}

\textsuperscript{58} Id.


\textsuperscript{60} See Charles M. Blow, The Obama Opposition, N.Y. TIMES (Nov. 9, 2014), http://www.nytimes.com/2014/11/10/opinion/charles-blow-the-obama-opposition.html?_r=0; Lauren Fox, Sanders Suggests Obama's Race Is a Factor in GOP 'Obstructionism', TPM LIVEWIRE (Feb. 23, 2016, 8:54 PM), http://talkingpointsmemo.com/livewire/sanders-race-obama-deligitimization-scoutus (quoting Sen. Bernie Sanders as saying "[w]hat you are seeing today in this Supreme Court situation is nothing more than the continuous and unprecedented obstructionism that President Obama has gone through... [T]he racist effort to try to delegitimize the president of the United States"); Alan Greenblatt, Race Alone Doesn't Explain Hatred of Obama, But It's Part of the Mix, NPR (May 13, 2014, 07:03 AM), http://www.npr.org/sections/codeswitch/2014/05/13/311908835/race-alone-doesntexplain-hatred-of-obama-but-its-part-of-the-mix; Williams, Exposes Judicial Incapacity, supra note 43, at 75 n.51 ("The present GOP/Tea Party appointment obstruction roots lie in ugly Southern Democrat race and religion hatred. Most recently the obstruction was directed at the entire governance effort of the first black President with a primary focus directed against his appointments.").

\textsuperscript{61} FED. JUD. CTR., supra note 27.

\textsuperscript{62} For example, although President Carter was not able to directly impact the diversity on the Supreme Court because he was one of the few presidents who did not have an opportunity to appoint a Supreme Court Justice, Carter was able to indirectly affect the makeup of the High Court.
Like the Supreme Court, the federal appellate bench has historically been comprised of white men. The first woman was not appointed to the federal appellate bench until 1934, and the first person of color was not appointed to the federal appellate bench until 1949. The makeup of the federal judiciary began to change during the Carter administration. When President Jimmy Carter took office in 1977, the federal appellate bench was approximately 95% white male. During his four years as president, Carter made a total of fifty-six appellate court appointments. Ten were white women, one was an African American woman (the first to be appointed a federal appellate judge), eight were African American men, two were Hispanic men, and one was an Asian American man (the first federal appellate judge of Chinese descent).

Although Carter made a dedicated effort to increase the diversity of the federal appellate bench, his immediate two successors felt no such obligation. Over the course of two terms, President Ronald Reagan made a total of eighty-six appellate judge appointments. Of that number, only six of those appointments were women and all were white. Of the seventy-seven male appointees, one was African American, and one was Hispanic. President George H.W. Bush appointed...
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forty-two federal appellate judges during his one term in office. Of that number, seven were white women, thirty-one were white men, two were African American men, and two were Hispanic men.\(^75\) Worse than the appointment of only thirteen women during the twelve-year span of the Regan and Bush I presidencies was the failure of a single woman of color to be appointed to the federal appellate bench during those twelve years.\(^76\)

During Bill Clinton’s two terms as president, he appointed sixty-six federal appellate judges—sixteen white women, three African American women, two Hispanic women, thirty-five white men, six African American men, five Hispanic men, and one Asian American man.\(^77\) George W. Bush appointed sixty-three federal appellate judges during eight years in office.\(^78\) Of that number, fourteen were white women, two were African American women, one was a Hispanic woman, forty were white men, four were African American men, and two were Hispanic men.\(^79\)

Before reviewing the diversity of President Obama’s fifty-seven federal appellate appointees,\(^80\) it should be noted that even though he served two terms, Obama has the third fewest confirmations of federal appellate judges of the last six presidents.\(^81\) Even Jimmy Carter, who only served one term, had one more federal appellate confirmation than Obama. Of the six previous presidents, Bush I was the only president with fewer appointments than Obama. Bush only served one term, and although Obama served two, he only had fourteen more federal appellate appointments than Bush.

Of the fifty-seven federal appellate judges appointed by Obama, twenty were white women, two were African American women, three were Hispanic women, one was an Asian American woman (the first),\(^82\) seventeen were white men, seven were African American men, four were Hispanic men, and three were Asian American men.\(^83\)

\(^75\) Id.
\(^76\) Id.
\(^77\) Id.
\(^78\) Id.
\(^79\) Id.
\(^80\) Id.
\(^81\) Id.
\(^82\) Id.
\(^83\) Id.

President Obama appointed and elevated then-U.S. District Judge Jacqueline Hong-Ngoc Nguyen to the United States Court of Appeals for the Ninth Circuit on May 14, 2012. Nguyen is the first Asian American woman appointed to the federal appellate bench, and the first Vietnamese American federal judge. Id.
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The following table shows the percentage of female federal appellate judge appointments for the last six presidents:

### Female Federal Appellate Judge Appointees

<table>
<thead>
<tr>
<th>President</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Obama</td>
<td>44%</td>
</tr>
<tr>
<td>Bush II</td>
<td>30%</td>
</tr>
<tr>
<td>Clinton</td>
<td>40%</td>
</tr>
<tr>
<td>Bush I</td>
<td>35%</td>
</tr>
<tr>
<td>Reagan</td>
<td>25%</td>
</tr>
<tr>
<td>Carter</td>
<td>20%</td>
</tr>
</tbody>
</table>

This table shows the percentage of federal appellate judge appointments that were people of color:

### People of Color Federal Appellate Judge Appointees

<table>
<thead>
<tr>
<th>President</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Obama</td>
<td>38%</td>
</tr>
<tr>
<td>Bush II</td>
<td>15%</td>
</tr>
<tr>
<td>Clinton</td>
<td>26%</td>
</tr>
<tr>
<td>Bush I</td>
<td>10%</td>
</tr>
<tr>
<td>Reagan</td>
<td>2%</td>
</tr>
<tr>
<td>Carter</td>
<td>21%</td>
</tr>
</tbody>
</table>

President Obama has made great strides in increasing the diversity of the federal appellate bench both in terms of gender and race.
And in doing so, he has increased the likelihood that the Supreme Court of the future will be more diverse.

IV. FEDERAL DISTRICT JUDICIAL APPOINTEES

While in modern history a federal district judge has not been directly elevated to the Supreme Court, district judges are often nominated to federal appellate judgeships, which will then increase their chances of being considered for a Supreme Court appointment. For example, Justice Sonia Sotomayor would not have been nominated to serve on the Supreme Court had she not been a federal appellate judge. However, Sotomayor may not have even been considered for a seat on the Second Circuit Court of Appeals (her position when appointed to the Supreme Court) if she was not at the time a federal district court judge. Because the trend of nominating federal appellate judges to serve on the Supreme Court will likely continue, and because it is not uncommon for district judges to be elevated to the position of a federal appellate judge, a president's district judge appointments can have an impact on the Supreme Court of the future as well.

Similar to his court of appeals judicial appointments, President Carter was progressive in his district judge appointments. Carter appointed 203 individuals to the federal district courts. Of that number, twenty-nine were women (comprised of twenty-two white women, six African American women, one Hispanic), and 174 were men (comprised of 136 white men, twenty-two African American men, one American Indian male, two Asian American men, thirteen Hispanic men, one Pacific Islander). President Reagan appointed 290 individuals to the federal district court. Of that number, twenty-four were women (twenty-two white women, one African American

84. Roughly 36% of appellate judges appointed in the last forty years (Carter through Obama) were sitting federal district judges at the time of their nomination, and overall district judges comprise the single largest group, with private practice coming in second at 32%. Research on file with author.
85. At the time of then-judge Sotomayor's appointment to the Second Circuit Court of Appeals in 1998 by President Clinton, she was a judge on the Southern District of New York District Court, having been appointed to that position by President Bush I in 1992. Dawson, supra note 5, at 189 n.51.
86. President Trump successfully nominated Neil Gorsuch, a federal appellate judge, to fill the vacancy on the Supreme Court.
87. See Dawson, supra note 5, at 189, 201–02.
88. FED. JUD. CTR., supra note 27.
89. Id.
90. Id.
woman, one Hispanic), 266 were men (247 white men, five African American men, two Asian American men, twelve Hispanic men). The first President Bush appointed 148 individuals to the federal district courts. Of that number, twenty-nine were women (twenty-four white women, two African American women, three Hispanic women), 119 were men (108 white men, eight African American men, three Hispanic men). President Clinton appointed 305 individuals to the federal district courts. Of that number, eighty-eight were women (seventy white women, thirteen African American women, one Asian American, four Hispanic women), 217 were men (159 white men, forty African American men, one American Indian, three Asian American men, fourteen Hispanic men). President Bush II appointed 261 individuals to the federal district courts. Of that number, fifty-four were women (thirty-six white women, six African American women, one Asian American, eleven Hispanic women), 207 were men (176 white men, twelve African American men, three Asian American men, sixteen Hispanic men). Finally, President Obama appointed 268 individuals to the federal district courts. Of that number, 110 were women (seventy white women, twenty-four African American women, one American Indian, nine Asian American, ten Hispanic women), 156 were men (104 white men, twenty-nine African American men, eight Asian American men, twenty Hispanic men, one Pacific Islander).

The following table shows the percentage of female federal district judge appointments for the last six presidents:

\[
\begin{array}{|c|c|c|}
\hline
\text{President} & \text{Women} & \text{Men} \\
\hline
\text{Bush I} & 29 & 119 \\
\text{Clinton} & 88 & 217 \\
\text{Bush II} & 54 & 207 \\
\text{Obama} & 110 & 156 \\
\hline
\end{array}
\]

91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
This table shows the percentage of federal district judge appointments that were people of color:

Like his federal appellate appointments, President Obama exceed his predecessors both in terms of race and gender in his selection of federal trial court judges. Not only does the increased diversity of the federal bench improve the federal judiciary as a whole because it is more representative, the increase in the diversity of the lower fed-
eral courts increases the chances that the Supreme Court of the future will likewise be diverse.

Conclusion

With the election of Donald Trump as president of the United States, it is safe to assume that none of President Obama’s lower court appointments will be elevated to the Supreme Court for at least the next four years. President Trump has already appointed Neil Gorsuch to fill Justice Scalia’s seat on the Bench. It is not yet clear if President Trump will have an opportunity to appoint another Justice to the Court, but the possibility does exist. The average age of retirement of Supreme Court justices from 1971 to 2006 was 78.7, and the current Court includes three Justices who are over the age of 77. Ruth Bader Ginsburg is 84, Anthony Kennedy is 80, and Stephen Breyer is 78. However, despite their ages, it is not a certainty that any of these justices will leave the bench during the next four years. The oldest justice was Oliver Wendell Holmes, Jr., who retired in 1932 at the age of 90, two months shy of his 91st birthday, and the second oldest justice was John Paul Stevens, who retired in 2010 at 90 years and two months.

Notwithstanding the vitality of the oldest members of the Court, it is hard to imagine that another Supreme Court vacancy will not occur during the term of the individual who is elected president in 2020. And if a democrat is elected, approximately thirteen of President Obama’s diverse federal appellate appointees will be under the age of 60 and will still be in a position of being age-viable Supreme Court candidates. If democrats do not win the White House until 2024, President Obama’s female court of appeals appointees, eight are currently under the age of 55. One of the eight is Asian, and one is Hispanic. Of President Obama’s diverse male court of appeals appointees, five are under the age of 55. Three are African American, and two are Asian.

103. Of President Obama’s female court of appeals appointees, eight are currently under the age of 55. One of the eight is Asian, and one is Hispanic. Of President Obama’s diverse male court of appeals appointees, five are under the age of 55. Three are African American, and two are Asian. See Fed. Jud. Ctr., supra note 27.
104. Presidents have become keenly aware of the importance of age in selecting nominees for Supreme Court appointment. See Dawson, supra note 5, at 192. Although the average ap-
the list of age-viable diverse candidates shrinks by half if a candidate under the age of 60 is desired.

With respect to President Obama’s district court appointees, it is possible for some of his diverse appointees to have a path the appointment to the Supreme Court. As noted above, Justice Sotomayor began her judicial career as a district court judge. Sotomayor was 38 when she was appointed to the district court bench. Five years later at the age of 43, Sotomayor was appointed to the federal court of appeals. Eleven years later, she was appointed to the Supreme Court at the age of 55.

If a democrat is elected president in 2020, approximately seventy-six of President Obama’s diverse federal district court appointees will be young enough to be appointed to and to serve two years on the court of appeals\textsuperscript{105} and remain age-viable for Supreme Court appointments. If democrats do not win the White House until 2024, that number drops to forty-one.

Whether President Obama will have an impact on the diversity of the Supreme Court in the future, will depend in large part on the results of the 2020 election. And while it is difficult to predict whether one or more of President Obama’s diverse federal court appointees will assume a seat on the Supreme Court, President Obama made a significant and lasting mark on the federal judiciary as a whole, and has set a high bar for presidents of the future.

footnote[105]{John Roberts served two years on the D.C. Circuit Court of Appeals at the time of his appointment to serve as Chief Justice of the Supreme Court. Clarence Thomas served approximately 1-1/2 years on D.C. Circuit Court of Appeals at the time of his appointment to the Supreme Court. See Dawson, supra note 5, at 189.}
# APPENDIX

Supreme Court Nominees from 1901-1966

<table>
<thead>
<tr>
<th>Nominating President</th>
<th>Nominee</th>
<th>Year Nominated</th>
<th>Senate Action</th>
<th>Previous Judicial Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>T. Roosevelt</td>
<td>Oliver Wendell Holmes, Jr.</td>
<td>1902</td>
<td>confirmed</td>
<td>Chief Justice of the Massachusetts Supreme Judicial Court</td>
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<tr>
<td></td>
<td>William R. Day</td>
<td>1903</td>
<td>confirmed</td>
<td>Judge of the United States Court of Appeals for the Sixth Circuit</td>
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<td></td>
<td>William Henry Moody</td>
<td>1906</td>
<td>confirmed</td>
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<tr>
<td>Taft</td>
<td>Horace Harmon Lurton</td>
<td>1909</td>
<td>confirmed</td>
<td>Judge of the United States Court of Appeals for the Sixth Circuit</td>
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<tr>
<td></td>
<td>Charles Evans Hughes</td>
<td>1910</td>
<td>confirmed</td>
<td>— —</td>
</tr>
<tr>
<td></td>
<td>Edward Douglass White*</td>
<td>1910</td>
<td>confirmed</td>
<td>Elevated from Associate Justice to Chief Justice of the United States</td>
</tr>
<tr>
<td></td>
<td>Willis Van Devanter</td>
<td>1910</td>
<td>confirmed</td>
<td>Judge of the United States Court of Appeals for the Eighth Circuit</td>
</tr>
<tr>
<td></td>
<td>Joseph Rucker Lamar</td>
<td>1910</td>
<td>confirmed</td>
<td>— —</td>
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<tr>
<td></td>
<td>Mahlon Pitney</td>
<td>1912</td>
<td>confirmed</td>
<td>— —</td>
</tr>
<tr>
<td>Wilson</td>
<td>James Clark McReynolds</td>
<td>1914</td>
<td>confirmed</td>
<td>— —</td>
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<tr>
<td></td>
<td>Louis Brandeis</td>
<td>1916</td>
<td>confirmed</td>
<td>Judge of the United States District Court for the Northern District of Ohio</td>
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<td></td>
<td>John Hessin Clarke</td>
<td>1916</td>
<td>confirmed</td>
<td>— —</td>
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<tr>
<td>Harding</td>
<td>William Howard Taft</td>
<td>1921</td>
<td>confirmed</td>
<td>Judge of the United States Court of Appeals for the Sixth Circuit</td>
</tr>
<tr>
<td></td>
<td>George Sutherland</td>
<td>1922</td>
<td>confirmed</td>
<td>— —</td>
</tr>
<tr>
<td></td>
<td>Pierce Butler</td>
<td>1922</td>
<td>confirmed</td>
<td>— —</td>
</tr>
<tr>
<td>Nominating President</td>
<td>Nominee</td>
<td>Year Nominated</td>
<td>Senate Action</td>
<td>Previous Judicial Position</td>
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<tr>
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<tr>
<td>Coolidge</td>
<td>Edward Terry Sanford</td>
<td>1923</td>
<td>confirmed</td>
<td>Judge of the United States District Court for the Eastern District of Tennessee and the Middle District of Tennessee</td>
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<td></td>
<td>Harlan Fiske Stone</td>
<td>1925</td>
<td>confirmed</td>
<td></td>
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<tr>
<td>Hoover</td>
<td>Charles Evans Hughes*</td>
<td>1930</td>
<td>confirmed</td>
<td>Previously Associate Justice of the Supreme Court of the United States</td>
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<td>John J. Parker</td>
<td>1930</td>
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<td>Judge on the United States Court of Appeals for the Fourth Circuit</td>
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<tr>
<td></td>
<td>Owen Josephus Roberts</td>
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<tr>
<td></td>
<td>Benjamin N. Cardozo</td>
<td>1932</td>
<td>confirmed</td>
<td>Chief Judge of the New York Court of Appeals</td>
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<tr>
<td>F. Roosevelt</td>
<td>Hugo Black</td>
<td>1937</td>
<td>confirmed</td>
<td></td>
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<tr>
<td></td>
<td>Stanley Forman Reed</td>
<td>1938</td>
<td>confirmed</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Felix Frankfurter</td>
<td>1939</td>
<td>confirmed</td>
<td></td>
</tr>
<tr>
<td></td>
<td>William O. Douglas</td>
<td>1939</td>
<td>confirmed</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Frank Murphy</td>
<td>1940</td>
<td>confirmed</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Harlan Fiske Stone*</td>
<td>1941</td>
<td>confirmed</td>
<td>Elevated from Associate Justice to Chief Justice of the United States</td>
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<tr>
<td></td>
<td>James F. Byrnes</td>
<td>1941</td>
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<td></td>
<td>Robert H. Jackson</td>
<td>1941</td>
<td>confirmed</td>
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<tr>
<td></td>
<td>Wiley Blount Rutledge</td>
<td>1943</td>
<td>confirmed</td>
<td>Judge of the United States Court of Appeals for the District of Columbia Circuit</td>
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<tr>
<td>Truman</td>
<td>Harold Hitz Burton</td>
<td>1945</td>
<td>confirmed</td>
<td></td>
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<tr>
<td>Nominating President</td>
<td>Nominee</td>
<td>Year Nominated</td>
<td>Senate Action</td>
<td>Previous Judicial Position</td>
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<td>----------------------</td>
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<tr>
<td></td>
<td>Fred M. Vinson</td>
<td>1946</td>
<td>confirmed</td>
<td>Judge of the United States Court of Appeals for the District of Columbia Circuit</td>
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<tr>
<td></td>
<td>Tom C. Clark</td>
<td>1949</td>
<td>confirmed</td>
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<tr>
<td></td>
<td>Sherman Minton</td>
<td>1949</td>
<td>confirmed</td>
<td>Judge of the United States Court of Appeals for the Seventh Circuit</td>
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<tr>
<td>Eisenhower</td>
<td>Earl Warren</td>
<td>1954</td>
<td>confirmed</td>
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<tr>
<td></td>
<td>John Marshall Harlan II</td>
<td>1955</td>
<td>confirmed</td>
<td>Judge of the United States Court of Appeals for the Second Circuit</td>
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<tr>
<td></td>
<td>William J. Brennan</td>
<td>1957</td>
<td>confirmed</td>
<td>Associate Justice of the Supreme Court of New Jersey</td>
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<td>Charles Evans Whittaker</td>
<td>1957</td>
<td>confirmed</td>
<td>Judge of the United States Court of Appeals for the Eighth Circuit</td>
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<td>Potter Stewart</td>
<td>1959</td>
<td>confirmed</td>
<td>Judge of the United States Court of Appeals for the Sixth Circuit</td>
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<tr>
<td>Kennedy</td>
<td>Byron White</td>
<td>1962</td>
<td>confirmed</td>
<td>-- --</td>
</tr>
<tr>
<td></td>
<td>Arthur Goldberg</td>
<td>1962</td>
<td>confirmed</td>
<td>-- --</td>
</tr>
<tr>
<td>L. Johnson</td>
<td>Abe Fortas</td>
<td>1965</td>
<td>confirmed</td>
<td>-- --</td>
</tr>
</tbody>
</table>

* Edward Douglass White, Charles Evan Hughes, and Harlan Fiske Stone were all nominated to the position of Chief Justice during this time period. However, they are not included in percentage calculation because, at the time of their nomination, they were or had served as an Associate Justice. The relevant percentage relates to new individuals nominated to serve on the High Court.