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Filling the Fourth Circuit Vacancies

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FILLING THE FOURTH CIRCUIT VACANCIES*

CARL TOBIAS**

Federal judicial selection has become increasingly controversial. Allegations and recriminations, partisan division, and incessant paybacks have accompanied the appeals court appointments process for decades. These phenomena were pervasive in the administration of President George W. Bush as well as in nominations and confirmations to the United States Court of Appeals for the Fourth Circuit, particularly with respect to judgeships assigned to North Carolina.

The protracted vacancies have eroded the Fourth Circuit's delivery of justice, as operating without the fifteen circuit judges whom Congress authorized has exacted a toll. Across two and a half recent years, the court functioned absent a quarter of its judicial complement and for more than a year without one-third. In fact, the court supplies published opinions for six percent of appeals, and oral arguments for thirteen percent of appeals—the fewest among the twelve regional circuits. For over four years beginning in September 1999, the Fourth Circuit had no active member from North Carolina, and for the ensuing seven years merely one active judge represented the state on the court.

The Fourth Circuit appointments process illustrates numerous difficulties that have plagued contemporary selection. Because of these difficulties, the court had four openings when President Barack Obama was inaugurated, and a fifth arose early in his tenure. The nascent White House devoted much attention to the Fourth Circuit, pledged to end the “confirmation wars,” and realized considerable success, notwithstanding the problematic history of counterproductive dynamics. At the conclusion of the administration's first half term and the 111th Senate, Obama had appointed jurists to four of the court's openings, mainly through

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assiduous consultation with home state elected officials and the nomination of ethnically and gender diverse sitting judges. Fourth Circuit judicial selection might also reflect the Obama Administration agenda regarding confirmation and serve as an informative template for subsequent appointment endeavors.

These recent developments demonstrate that judicial selection in the Fourth Circuit deserves review. This Article first analyzes the history of the Fourth Circuit process, emphasizing developments in the Bush Administration. The Article then descriptively and critically scrutinizes nomination and confirmation throughout the Obama Administration. The Article next derives lessons from the Fourth Circuit initiative and compares it with the Obama Administration's national selection efforts and those of earlier administrations. The Article concludes with recommendations for how the President and the Senate could enhance selection procedures in the Fourth Circuit, and considers how lessons extracted from that selection process may improve appointments throughout the nation.

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INTRODUCTION

The appointment of federal judges has grown extremely controversial. Allegations and countercharges, interparty squabbling and unceasing retribution have punctuated the appeals court selection process for the last quarter century. These phenomena were ubiquitous during the administration of President George W. Bush as well as in nominations and appointments to the United States Court of Appeals for the Fourth Circuit, especially regarding judgeships assigned to North Carolina. Over the Bush Administration's concluding half term, the White House proffered six nominees for the appellate court's five vacant positions; the 110th Senate promptly confirmed a single prospect and did not even grant votes to the remainder.¹

The openings have undercut the Fourth Circuit's delivery of justice because the court was forced to operate without as many as five of the fifteen court of appeals judges whom Congress has authorized.² For over thirty months, the court functioned without a quarter of its judicial complement, and for more than a year absent one-third. In fact, the court furnishes published opinions for six percent of appeals that it resolves, and the court holds oral arguments in thirteen percent, the least among the twelve regional circuits.³ From September 1999 until August 2003, the Fourth Circuit had no active member from North Carolina, and during the ensuing seven years merely one active judge represented the state on the court.⁴

The Fourth Circuit appointments process epitomizes the complications that have accompanied contemporary selection. Because of these complications, the Fourth Circuit experienced four vacancies when President Barack Obama was inaugurated, and a fifth materialized early in his tenure. Accordingly, the nascent Obama Administration devoted considerable attention to the court, vowed to end the "confirmation wars," and realized much success,

1. See *infra* notes 19–29 and accompanying text.

2. See *Archive of Judicial Vacancies*, USCOURTS.GOV, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveofJudicialVacancies.aspx> (lasted visited Aug. 17, 2011) (accessed by clicking on 2007, 2008, 2009, or 2010 and then clicking on each month to show the number of vacancies for that year).

3. *Judicial Business 2010*, tbls.S-1 & S-3, USCOURTS.GOV, <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2010.aspx> (lasted visited Aug. 17, 2011) [hereinafter *Judicial Business*]; see Carl Tobias, *Fourth Circuit Publication Practices*, 62 WASH. & LEE L. REV. 1733, 1739–42 (2005).

4. See *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on any month from January 1999 through August 2003 and then clicking on each month to show the number of vacancies for that year).

notwithstanding the counterproductive dynamics and problematic history. At the conclusion of the administration's first half term and the 111th Senate, President Obama had placed jurists in four of the court's vacancies, mainly through assiduous consultation with home state elected officials and the nomination of ethnically and gender diverse sitting judges. Fourth Circuit judicial selection might also reflect the President's agenda respecting confirmation and provide an informative template for subsequent appointments endeavors.

This background demonstrates that judicial selection in the Fourth Circuit merits evaluation, which this Article conducts. Part One analyzes the history of the Fourth Circuit appointments process, stressing developments in the Bush Administration. Part Two descriptively and critically scrutinizes nomination and confirmation throughout the Obama Administration. Part Three derives lessons from the Fourth Circuit activity and compares it with the Obama Administration's national selection efforts and the initiatives of earlier administrations. For instance, the Article finds that the nominees appointed were ethnic minority or female sitting judges and their average age upon confirmation was fifty-six. Therefore, the judges' appointments increased the court's ethnic and gender diversity and could portend adoption of a "career judiciary," yet they fail to accentuate diversity of experience and only minimally increase age diversity. Part Four offers recommendations for how the President and the Senate could enhance selection procedures in the Fourth Circuit and considers how lessons derived from that selection effort may improve appointments throughout the nation.

I. THE HISTORY OF JUDICIAL SELECTION

The origins and development of Fourth Circuit judicial selection deserve limited exploration in this piece because that history has received thorough assessment elsewhere.⁵ However, a brief canvass is warranted because it will expand appreciation of the practices deployed in the Fourth Circuit and generally; more recent actions,

5. See Peter G. Fish, *Merit Selection and Politics: Choosing a Judge of the United States Court of Appeals for the Fourth Circuit*, 15 WAKE FOREST L. REV. 635, 635-36, 637-50 (1979); Carl Tobias, *Federal Judicial Selection in the Fourth Circuit*, 80 N.C. L. REV. 2001, 2004-29 (2002). For federal judicial selection's history, policy, and practices, see generally MICHAEL GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2000) (discussing the origins, structure, and evolution of the Federal Appointments Process); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997) (surveying Federal Judicial Selection throughout American history).

especially in the Obama Administration; and promising measures for improvement of the nomination and confirmation processes.

A. *The Early Background*

During most of the Fourth Circuit's history, judicial selection for the court engendered minimal controversy. Throughout much of the century following 1891, when the Evarts Act instituted the contemporary appeals court system, including the Fourth Circuit,⁶ judicial appointments were relatively uncontroversial. The court had few members, openings were rare, and Presidents frequently deferred to elected officials who represented the states in which vacancies arose.⁷ In 1961, Congress had authorized a mere five judges for the Fourth Circuit, and even by 1978 Congress had authorized only ten.⁸ Adoption of the most recent comprehensive judgeships legislation in 1990 enlarged the Fourth Circuit's contingent to its existing fifteen members.⁹ However, the court has yet to function with all the positions occupied, and the increasing number and occurrence of vacancies explain, in part, slow Fourth Circuit appointments, phenomena which are correspondingly manifested nationwide.¹⁰

There were a few exceptions to the uncontroversial nomination and confirmation systems that existed prior to 1990. One salient controversy involved a North Carolina vacancy during the administration of President Jimmy Carter. His United States Circuit Judge Nominating Panel for the Fourth Circuit solicited applications and recommended: Julius Chambers, a venerable civil rights lawyer; Western District of North Carolina Judge James McMillan, who decided the important Charlotte-Mecklenburg school desegregation

6. Judiciary Act of 1891 (Evarts Act), ch. 517, 26 Stat. 826 (codified as amended at 28 U.S.C. § 43 (2006)); see THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 9-11* (1994).

7. See MILLER CTR. COMM'N ON THE SELECTION OF FED. JUDGES, *IMPROVING THE PROCESS OF APPOINTING FEDERAL JUDGES: A REPORT OF THE MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES 3* (1996), available at http://web1.millercenter.org/commissions/comm_1996.pdf.

8. Judgeship Act of 1961, Pub. L. No. 87-36, § 1(a), (b), 75 Stat. 80, 80 (codified as amended at 28 U.S.C.A. § 44(a) (2006 & Supp. 2010)); Judgeship Act of 1978, Pub. L. No. 95-486, § 3(a), (b), 92 Stat. 1629, 1632 (codified as amended at 28 U.S.C.A. § 44(a) (2006 & Supp. 2010)).

9. Federal Judgeship Act of 1990, Pub. L. No. 101-650, § 202(a), (b), 104 Stat. 5089, 5098-99 (codified as amended at 28 U.S.C.A. § 44(a) (2006 & Supp. 2010)).

10. As to vacancies' number and frequency, see Gordon Bermant, Jeffrey A. Hennemuth & A. Fletcher Mangum, *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 323-25 (1994); Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 550-51 (1998).

case at the trial level; Dickson Phillips, Dean of the University of North Carolina School of Law; Kenneth Pye, Chancellor of Duke University and former Dean of the School of Law; and William Van Alstyne, a renowned Duke University School of Law Professor.¹¹ Following machinations between Senator Jesse Helms (R-N.C.) and Senator Robert Morgan (D-N.C.),¹² President Carter tapped Dean Phillips and he won prompt appointment.

B. The Modern Background

During the administration of President Ronald Reagan, Fourth Circuit judicial appointments functioned smoothly, in part because the Republican Party (“GOP”) had a Senate majority across his opening term-and-a-half, and no Fourth Circuit vacancy arose during his final two years.¹³ The process also operated well for much of President George H. W. Bush’s tenure. At his administration’s end, however, confirmations stalled. Democrats argued that slow nomination precluded swift appointment, but Republicans claimed that Democrats slowed the processing in hopes of maximizing the number of vacancies that a Democratic President might fill.¹⁴ For instance, President Bush nominated Eastern District of North Carolina Judge Terrence Boyle in October 1991,¹⁵ yet he secured no floor vote before the Senate adjourned in late 1992, even though the Senate approved Judge Karen Williams, who was nominated on January 27, 1992, one month later.¹⁶

11. See GOLDMAN, *supra* note 5, at 273–74; Fish, *supra* note 5, at 647. For additional discussion of the nominating panel, see Fish, *supra* note 5, at 637–47. See generally LARRY C. BERKSON & SUSAN B. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980) (assessing the Circuit Judge Nominating Commission).

12. See Fish, *supra* note 5, at 648–50.

13. *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on 1987, then opening the file for each month in 1987, which shows there were no judicial vacancies in 1987 in the Fourth Circuit; the same process can be repeated for 1988, which also shows there were no vacancies in 1988 on the court).

14. See Sheldon Goldman, *Bush’s Judicial Legacy: The Final Imprint*, 76 *JUDICATURE* 282, 282–85, 296–97 (1993); Carl Tobias, *The Federal Appellate Court Appointments Conundrum*, 2005 *UTAH L. REV.* 743, 751.

15. *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on 1991, then opening the file for November 1, 1991, which shows that Terrence W. Boyle was nominated on October 22, 1991).

16. *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on 1992, then opening the file for February 1, 1992, which shows that Karen J. Williams was nominated on January 27, 1992); see Tobias, *supra* note 5, at 2026; Tobias, *supra* note 14, at 747; Brooke A. Masters, *For One Nominee, Fight Ahead*, *WASH. POST*, May 18, 2001, at A29.

During President Bill Clinton's administration, the selection process for vacancies in most Fourth Circuit jurisdictions worked effectively. For instance, two West Virginia nominees and one each from Maryland and South Carolina received prompt approval, mainly because they were highly competent and the President consulted home state politicians ahead of official nomination.¹⁷ North Carolina was a major exception. President Clinton nominated four well-qualified, moderate, uncontroversial candidates from that state. However, the Senate never voted on United States District Judge James Beaty, United States Bankruptcy Judge Richard Leonard, North Carolina Court of Appeals Judge James Wynn, or University of North Carolina School of Law Professor S. Elizabeth Gibson, mostly due to Senator Helms's opposition, which apparently constituted payback for Democratic senators' treatment of Judge Boyle.¹⁸

President George W. Bush realized checkered success when appointing his nominees. The chief executive infrequently consulted political officers—even Republican senators—from jurisdictions in which vacancies materialized, tendered consensus picks, or cooperated with the Senate to approve nominees.¹⁹ For example, President Bush persistently renominated Judge Boyle and Department of Defense General Counsel William J. Haynes, although Senate members from both parties opposed the candidates.²⁰ Neither secured a floor vote, and when Democrats reassumed Senate control in 2006, the administration decided against renominating the candidates.²¹ President Bush also nominated Claude Allen, the United States Department of Health and Human Services Deputy Secretary, for a Maryland vacancy, but the jurisdiction's Democratic senators, Paul Sarbanes and Barbara Mikulski, refused to support

17. Judges M. Blane Michael and Robert King were the West Virginia nominees, Judge Diana Gribbon Motz was the Maryland nominee, and Judge William Traxler was the South Carolina nominee. Tobias, *supra* note 5, at 2027.

18. See *id.*; David G. Savage, *Senate Fight Over Judges is Like Family Feud*, L.A. TIMES, Aug. 1, 2010, at A19 [hereinafter Savage, *Family Feud*]; see also David G. Savage, *Clinton Losing Fight for Black Judge*, L.A. TIMES, Jul. 7, 2000, at A1 (discussing battle over nomination of Judge Wynn).

19. Carl Tobias, *Filling Federal Appellate Vacancies*, 41 ARIZ. ST. L.J. 829, 858–59 (2009). See generally Tobias, *supra* note 5 (providing relevant history and suggestions for President Bush).

20. See Sheldon Goldman et al., *Picking Judges in a Time of Turmoil: W. Bush's Judiciary During the 109th Congress*, 90 JUDICATURE 252, 260–61 (2007).

21. Neil A. Lewis, *Bush Drops Plans to Resubmit 3 Judicial Nominees*, N.Y. TIMES, Jan. 10, 2007, at A18.

Allen because he had only briefly practiced law inside Maryland, and thus, lacked familiarity with the local legal culture.²²

After the Democrats gained a Senate majority in 2007, President Bush nominated six candidates to fill four vacancies, one each in Maryland, North Carolina, South Carolina, and Virginia. Maryland Senators Mikulski and Ben Cardin (D-Md.), who replaced Senator Sarbanes, did not favor Rod Rosenstein, the United States Attorney for the District of Maryland, whom they suggested remain in his post.²³ Many Democrats and some interest groups opposed the North Carolina nominee, Western District of North Carolina Chief Judge Robert Conrad, in part due to his views on a few controversial questions.²⁴ A number of Democrats rejected the South Carolina nominee, attorney Steve Matthews, because he allegedly held ideological perspectives that were beyond the legal mainstream and perhaps because he was a member of the Federalist Society.²⁵ Democrats refused to support a Virginia nominee, attorney E. Duncan Getchell, Jr., as he was not among the five candidates who had received a positive rating from a bipartisan group created by the

22. See *Confirmation Hearing on the Nomination of Claude A. Allen, of Virginia, to be Circuit Judge for the Fourth Circuit; and Mark R. Filip, of Illinois, to Be District Judge for the Northern District of Illinois: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 177–78 (2003) (letter from Sen. Barbara A. Mikulski & Sen. Paul S. Sarbanes to Alberto R. Gonzales, Counsel to the President); *id.* at 176 (letter from Sen. Barbara A. Mikulski & Sen. Paul S. Sarbanes to Sen. Orrin G. Hatch, Chairman, & Sen. Patrick J. Leahy, Ranking Member); see also Michael D. Shear, ‘Conservative Values’ Guide Court Appointee, WASH. POST, May 5, 2003, at B1 (outlining the views of both supporters and non-supporters of the candidate).

23. See Tricia Bishop, *U.S. Courts Due for Left Turn with Obama*, BALT. SUN, Dec. 7, 2008, at 1A; Matthew Dolan, *Bush Picks U.S. Attorney for Md. for 4th Circuit*, BALT. SUN, Nov. 16, 2007, at 1A; Eric Rich, *White House Might Nominate Rosenstein*, WASH. POST, Sept. 13, 2007, at B6.

24. Mark Hansen, *Logjam*, A.B.A. J., June 2008, at 39, 39. Democrats cited Conrad’s opinion piece that labeled Planned Parenthood the “most radical legal advocate of unfettered abortion on demand.” Robert Conrad, *Planned Parenthood: A Radical Pro-Abortion Fringe Group*, CHARLOTTE OBSERVER (N.C.), June 14, 1988, at 19A. They also cited his letter that strongly criticized Sister Helen Prejean as a “church-hating nun” and her book, *Dead Man Walking*, as “liberal drivel.” Robert Conrad, Letter to the Editor, *Habitually Wrong*, CATHOLIC DOSSIER, Jan.–Feb. 1999, at 3; see also Savage, *Family Feud*, *supra* note 18 (indicating that the Senate never voted on Conrad’s nomination).

25. Rick Brundrett, *Columbia Man Nominated for U.S. 4th Circuit Judge*, THE STATE (Columbia, S.C.), July 3, 2007, at A1, available at 2007 WLNR 12500112; Rick Brundrett, *Dreams and Doubts in The Federalist Society: Federalist Society Hopes Obama Picks Moderate Judge*, THE STATE (Columbia, S.C.), Jan. 18, 2009, 2009 WLNR 985114; see Jim Morrill, *Charlotte Judge Nominated to 4th Circuit Court of Appeals*, CHARLOTTE OBSERVER (N.C.), Nov. 4, 2009, at 19A, available at 2009 WLNR 22031796.

jurisdiction's senators, John Warner (R-Va.) and Jim Webb (D-Va.), to evaluate and interview applicants.²⁶

There were a few principal exceptions during President Bush's tenure. For example: Virginia Supreme Court Justice G. Steven Agee, who was recommended by the bipartisan panel and was confirmed in sixty days;²⁷ Judge Allyson K. Duncan, a nominee on whom the North Carolina senators agreed and who smoothly and promptly captured appointment;²⁸ and Judge Roger Gregory, whom President Clinton had first named to the appeals court with a recess appointment, and President Bush proposed at the suggestion of Virginia Republican Senators Warner and George Allen.²⁹

C. Impacts

Because of these judicial appointment problems, the Fourth Circuit has yet to operate with its complete authorized contingent of fifteen judges. From the middle of 2007 until the beginning of 2010, the tribunal labored with four, and sometimes five, openings.³⁰ North Carolina easily presented the worst case scenario. Judge Duncan's appointment ended a four-year period when the state lacked representation on the court by an active jurist. However, Judge Duncan was the only active North Carolina jurist in the seven years preceding Judge Wynn's August 2010 confirmation to fill Judge

26. Hansen, *supra* note 24, at 42; *see also* Jerry Markon, *Bush's Picks for Court Spur Criticism by Warner, Webb*, WASH. POST, Sept. 7, 2007, at B5 (discussing Bush's nomination of Gatchell and Matthews); Carl Tobias, *Baffling Vacancy on Federal Bench*, BALT. SUN, Jan. 18, 2008, at 21A, *available at* http://articles.baltimoresun.com/2008-01-18/news/0801180263_1_vacancy-judge-luttig-virginia-lawyer (analyzing Bush's decision not to accept any of Sen. Webb's and Sen. Warner's recommended candidates).

27. *See* 154 CONG. REC. 9724–26 (2008); Jerry Markon, *U.S. Appeals Court Gets New Judge*, WASH. POST, Aug. 3, 2008, at 8 (Prince William Extra section). Another Virginia nominee, Western District Judge Glen Conrad, who was among the five, was nominated too late in a presidential election year to secure confirmation. *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on 2008, then June which shows Glen Conrad was nominated on May 8, 2008).

28. *See* 149 CONG. REC. 18,557 (2003); *see also* Mike Allen, *Virginian Picked for 4th Circuit Judgeship*, WASH. POST, Apr. 29, 2003, at B1 (announcing Allyson K. Duncan's nomination and providing background information on her qualifications).

29. Alison Mitchell, *Senators Confirm 3 Judges, Including Once-Stalled Black*, N.Y. TIMES, July 21, 2001, at A16; Savage, *Family Feud*, *supra* note 18; *see* Tobias, *supra* note 5, at 2027–28. After the GOP recaptured the Senate during 2002, the Democrats, in an apparent goodwill gesture, confirmed Fourth Circuit Judge Dennis Shedd, whom they had opposed. Richard Simon, *Senate OKs Long-Delayed Appeals Court Nomination*, L.A. TIMES, Nov. 20, 2002, at A22.

30. *See Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on 2007, 2008, 2009, or 2010 and then clicking on each month to show the number of vacancies for that year).

Phillips's vacancy, which had remained open for sixteen years, the most protracted nationwide.³¹ This dearth is especially important because North Carolina has the Fourth Circuit's most substantial population base, and thus, arguably is entitled to the greatest representation.³²

The Fourth Circuit presently affords the smallest percentages of published opinions and oral arguments of all twelve regional circuits.³³ The appeals court also relies somewhat, albeit decreasingly, on visiting judges.³⁴ Nonetheless, the Fourth Circuit resolves cases more quickly than all except three circuits.³⁵ Publication and argument percentages are helpful yardsticks of appellate justice. However, those empirical data cannot yield conclusive determinations because they furnish a snapshot, rather than a complete picture, and there are some plausible explanations for the small percentages.³⁶

II. EVALUATION OF JUDICIAL SELECTION IN THE OBAMA ADMINISTRATION

A. *Descriptive Evaluation*

President Obama has adopted many specific policies designed to enhance judicial selection in the Fourth Circuit and nationwide.³⁷ Before President Obama captured the presidency, he started planning

31. 156 CONG. REC. S6991 (daily ed. Aug. 5, 2010); see *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on each of the sixteen years preceding 2010, which shows that Judge Phillips' seat was vacant for the sixteen years prior to 2010).

32. Barbara Barrett, *N.C. Judges Get Busy on 4th Circuit Court*, CHARLOTTE OBSERVER (N.C.), May 22, 2011, at 15A, available at <http://www.charlotteobserver.com/2011/05/22/2315578/nc-judges-get-busy-on-4th-circuit.html>.

33. *Judicial Business*, *supra* note 3, tbls.S-1 & S-3; see Tobias, *supra* note 3, at 1739.

34. *Judicial Business*, *supra* note 3, at tbl.S-2.

35. *Id.* at tbl.B-4 (hearing to final disposition).

36. For example, the large percentage of Fourth Circuit *pro se* appeals, which inmates especially pursue, could mean that the docket's composition warrants the small percentages of oral arguments and published opinions. For information on the percentage of *pro se* appeals in the Fourth Circuit, see *id.* at tbl.B-9. The small percentages of arguments and published opinions are one explanation for the expeditious disposition rate. See Carl Tobias, *A Fourth Circuit Photograph*, 45 WAKE FOREST L. REV. 1373, 1383 (2010).

37. Carl Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 776-81 (2010); see Peter Baker & Adam Nagourney, *Sotomayor Pick a Product of Lessons From Past Battles*, N.Y. TIMES, May 28, 2009, at A1; Jerry Markon & Shailagh Murray, *Vacancies on Federal Bench Hit Crisis Point*, WASH. POST, Feb. 8, 2011, at A1; Jeffrey Toobin, *Bench Press*, THE NEW YORKER, Sept. 21, 2009, at 42, 42-43. See generally CHRISTINE NEMACHECK, STRATEGIC SELECTION (2007) (discussing how to advise a president on nominating candidates).

for appointments.³⁸ Obama swiftly named Gregory Craig, a talented attorney with much expertise, as White House Counsel.³⁹ Craig promptly enlisted competent lawyers to recruit designees.⁴⁰ The administration also capitalized on Vice President Joe Biden's three-and-a-half decade Senate Judiciary Committee experience.⁴¹ The selection team predicted and addressed complications that might surface when picking judges. For example, it compiled "short lists" of leading candidates for possible Supreme Court vacancies.⁴² President Obama has emphasized bipartisanship, partly by soliciting the advice of Democratic and Republican committee members and high-ranking party officials from the states in which openings result, prior to formal nominations.⁴³

Often before, and invariably after, nominations, the White House and Senate have coordinated. To facilitate appointments, President Obama cooperated with Senators Patrick Leahy (D-Vt.), the panel chair, who schedules hearings and votes; Harry Reid (D-Nev.), the Majority Leader, who arranges floor consideration; and their GOP analogues, Senators Jeff Sessions (R-Ala.) and Mitch McConnell (R-Ky.).⁴⁴

When President Obama assumed office, Maryland, North Carolina, South Carolina, and Virginia each had one vacancy.⁴⁵ The summer 2009 retirement of Chief Judge Williams, an experienced appeals court member, created a fifth unoccupied seat.⁴⁶ President Obama, like his predecessors, has tendered nominees from the same jurisdiction in which the vacancies arose except for the opening

38. See generally Toobin, *supra* note 37 (discussing Obama's plans for appointments).

39. See Letter from Gregory Craig, Counsel to the President, to President Barack Obama (Nov. 13, 2009), available at <http://abovethelaw.com/2009/11/musical-chairs-greg-craig-out-as-white-house-counsel-bob-bauer-in/>.

40. Jon Ward, *White House Beefs Up Legal Staff: Officials Cite Need to Tackle "Nightmare" Vetting Process*, WASH. TIMES, July 21, 2009, at B1, available at http://www.washingtontimes.com/news/2009/jul/21/white-house-beefs-up-legal-staff/?feat=home_headlines.

41. Keith Koffler, *Biden's Staff Has Key Role in Sotomayor Confirmation*, ROLL CALL (May 26, 2009, 2:03 PM), <http://www.rollcall.com/news/-35256-1.html>.

42. See Baker & Nagourney, *supra* note 37.

43. See Tobias, *supra* note 37, at 777; *infra* notes 48, 63–64, 73 and accompanying text.

44. Tobias, *supra* note 37, at 779.

45. *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on 2009, then clicking on January to see the number of vacancies in the Fourth Circuit in January 2009).

46. Judge Williams retired due to illness. Josh White & Jerry Markon, *Diagnosis of Early Alzheimer's Forces Chief Judge to Retire*, WASH. POST, July 10, 2009, at B3; see Eric Connor, *Court Faces Shift Under Traxler*, GREENVILLE NEWS (S.C.), July 12, 2009, at 1A.

created when South Carolina Judge William Wilkins decided that he would assume senior status in 2007.⁴⁷

For a Maryland position that had remained unfilled since July 31, 2000, President Obama acted quickly. The White House consulted Senators Mikulski and Cardin, who rapidly suggested United States District Judge Andre Davis, whom President Clinton had nominated in October 2000, when it was too late during a presidential election year for appointment.⁴⁸ Davis had secured valuable experience as a district judge for a decade-and-a-half in a busy court.⁴⁹ President Obama nominated Judge Davis on April 2, 2009.⁵⁰ The Senate Judiciary Committee expeditiously provided the nominee an April 29 hearing in which Senator Sessions asked many probing questions.⁵¹ The committee approved Davis by a vote of sixteen to three on June 4, 2009.⁵² Five months later, after Senator Cardin had admonished members numerous times in the committee and on the floor about the essential importance of granting a vote, the Senate conducted spirited floor debate and confirmed Judge Davis by a vote of seventy-two to sixteen on November 9, 2009.⁵³

47. See *infra* notes 48–75 and accompanying text.

48. *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on 2000, then November, which shows Judge Davis was nominated); see Tobias, *supra* note 5, at 2027; Tricia Bishop, *City Judge Nominated for Court of Appeals, U.S. District's Davis Gets a Second Shot at 4th Circuit*, BALT. SUN, Apr. 3, 2009, at 3A, available at http://articles.baltimoresun.com/2009-04-03/news/0904020105_1_district-court-court-of-appeals-davis.

49. See Bishop, *supra* note 48.

50. Press Release, White House Office of the Press Sec'y, President Obama Announces Judge Gerard Lynch for United States Court of Appeals for the Second Circuit, Judge Andre Davis for the United States Court of Appeals for the Fourth Circuit (Apr. 2, 2009), available at <http://www.whitehouse.gov/the-press-office/president-obama-announces-judge-gerard-lynch-united-states-court-appeals-second-cir>; see Bishop, *supra* note 48.

51. *Confirmation Hearings on Federal Appointments Before the S. Comm. on the Judiciary*, 111th Cong. 350–54 (2009) (responses of Andre M. Davis to the written questions of Sen. Jeff Sessions); see also Carl Tobias, *Fill the 4th Circuit's Vacancies Now*, BALT. SUN, Oct. 6, 2009, at 13A, available at http://articles.baltimoresun.com/2009-10-06/news/0910050022_1_murnaghan-maryland-senators-nomination (providing background and urging the Senate to confirm Judge Davis).

52. See Henri Cauvin, *Senate Committee Backs 4th Circuit Nominee*, WASH. POST, June 5, 2009, at B3; Michael A. Fletcher, *Obama Criticized as Too Cautious, Slow on Judicial Posts*, WASH. POST, Oct. 26, 2009, at A1 (“Davis was nominated in April and received a hearing within weeks, winning Judiciary Committee approval with a bipartisan vote of 16 to 3 on June 4.”).

53. 155 CONG. REC. S11,282 (daily ed. Nov. 9, 2009); see 155 CONG. REC. S10,754 (daily ed. Oct. 27, 2009) (statement of Sen. Cardin); see also Tricia Bishop, *Senate Confirms Davis to U.S. 4th Circuit*, BALT. SUN, Nov. 10, 2009, at 4A, available at http://articles.baltimoresun.com/2009-11-10/news/0911090065_1_andre-maurice-davis-appeals-court-appellate-bench (analyzing Cardin's admonitions and Davis's confirmation). *But see*

President Obama promptly consulted Virginia Democratic Senators Jim Webb and Mark Warner about filling the state's empty post.⁵⁴ The lawmakers asked Virginia bar groups to seek applications for the opening and screen candidates. The bar groups received applications and interviewed prospects during February and tendered recommendations to the legislators in March.⁵⁵ The Webb and Warner chiefs of staff and a few attorneys carefully interviewed the applicants during the next month. The senators recommended Virginia Supreme Court Justice Barbara Milano Keenan in June, and President Obama nominated her on September 14, 2009.⁵⁶ Keenan had served in all four levels of the Virginia court system and had been a Supreme Court Justice for almost two decades.⁵⁷ The Judiciary Committee accorded her an October 7, 2009 hearing and reported Keenan by voice vote on October 29, 2009.⁵⁸ After McConnell required that the nominee wait four months and that Democrats file a cloture petition, the Senate eventually approved cloture for, and

155 CONG. REC. S10,752 (daily ed. Oct. 27, 2009) (statement of Sen. Sessions) (stating that Bush nominees often waited much longer for confirmation).

54. David Ingram, *Four and Counting for the Fourth Circuit*, NAT'L L. J., Nov. 16, 2009, at 19, 22; Neil A. Lewis, *Obama's Court Nominees Are Focus of Speculation*, N.Y. TIMES, Mar. 11, 2009, at A19; J. Harvie Wilkinson III, *Storming the Fourth Circuit*, WASH. POST, Jan. 23, 2009, at A15; Statements of Senators Webb and Warner on White House Nomination of Justice Barbara Keenan for Federal Appeals Court Vacancy, TARGETED NEWS SERV. (Sept. 14, 2009), http://www.targetednews.com/pr_disp.php?pr_id=2395659. The author was an applicant for this opening and relies partly on that experience.

55. Alan Cooper, *VBA, VTLA Make Federal Court Endorsements*, VLW BLOG (Feb. 25, 2009), <http://valawyersweekly.com/vlwblog/2009/02/25/vba-vtla-make-federal-court-endorsements/>.

56. See Press Release, The Office of Sen. Mark Warner, Statement on White House Nomination of Justice Barbara Keenan for Federal Appeals Court Vacancy (Sept. 14, 2009), available at <http://webb.senate.gov/newsroom/pressreleases/2009-09-14-01.cfm>; Press Release, White House Office of the Press Sec'y, President Obama Nominates Justice Barbara Milano Keenan for United States Court of Appeals for the Fourth Circuit (Sept. 14, 2009), available at <http://www.whitehouse.gov/the-press-office/president-obama-nominates-justice-barbara-milano-keenan-united-states-court-appeals>.

57. See Tom Jackman, *Va. Judge Nominated for Appeals Court: Alexandria Woman Is a Trailblazer*, WASH. POST, Sept. 15, 2009, at B5.

58. *Confirmation Hearings on Federal Appointments: Hearing on Barbara Milano Keenan to be U.S. Circuit Judge for the Fourth Circuit Before the S. Comm. on the Judiciary*, 111th Cong. 1 (Oct. 7, 2009); Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary, SENATE.GOV (Oct. 29, 2009), <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da1529837> (showing a webcast of voice vote); see Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary, SENATE.GOV (Oct. 22, 2009), <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da1521961> (showing a webcast of Sen. Sessions's request to hold over Keenan for a week); see also Ingram, *supra* note 54, at 22 (providing background information about Judge Keenan).

confirmed, her by identical ninety-nine to zero votes on March 2, 2010.⁵⁹

President Obama expeditiously consulted Senator Kay Hagan (D-N.C.) and Senator Richard Burr (R-N.C.) regarding the North Carolina position, which had been empty since Judge Phillips assumed senior status in 1994. Senator Hagan raised the possibility of transferring one of four South Carolina posts to her jurisdiction.⁶⁰ Senator Hagan established a judicial selection commission, headed by former North Carolina Supreme Court Chief Justice Burley Mitchell, which interviewed forty prospects and provided suggestions to Senator Hagan.⁶¹ Judge Wynn and Charlotte Superior Court Judge Albert Diaz were among the candidates that the commission proposed.⁶² Senator Hagan consulted with the Obama Administration and with Senator Burr about Wynn and Diaz, especially regarding the possibility of one candidate's nomination to the South Carolina position left open by Judge Wilkins's 2007 assumption of senior status.⁶³ The Obama Administration agreed with her suggestions regarding the potential nominees and the South Carolina judgeship's possible transfer, and Senator Burr voiced his support for the two ideas.⁶⁴

Accordingly, on November 4, 2009, President Obama nominated Judges Wynn and Diaz.⁶⁵ Wynn had been a well respected jurist on

59. See 156 CONG. REC. S908–10 (daily ed. Mar. 2, 2010); see also 156 CONG. REC. S1566–67 (daily ed. Mar. 16, 2010) (statement of Sen. Warner) (explaining how one senator caused the delay in confirming Judge Keenan and why the cloture vote had to be called).

60. See *supra* note 31 and accompanying text; see also Gary L. Wright & Jim Morrill, *White House Evaluates Diaz for 4th Circuit Court*, CHARLOTTE OBSERVER (N.C.), Oct. 9, 2009, at 1A (analyzing Sen. Hagan's role in raising the possibility).

61. Barbara Barrett & Mark Johnson, *2 N.C. Judges Nominated for 4th Circuit*, CHARLOTTE OBSERVER (N.C.), Nov. 5, 2009, at 1A; Jim Morrill, *Panel Will Screen Judicial Candidates*, CHARLOTTE OBSERVER (N.C.), Apr. 1, 2009, at 2B.

62. President Clinton nominated Judge Wynn in 1999, but the Senate did not vote on his nomination. Wright & Morrill, *supra* note 60; see *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on 1999, then click on October to see that Judge Wynn was nominated in 1999); see also *supra* note 18 and accompanying text (explaining President Clinton had nominated Judge Wynn in 1999).

63. Barrett, *supra* note 32; Rick Brundrett, *Judge Wilkins Stepping Down*, THE STATE (Columbia, S.C.), Dec. 1, 2006, 2006 WLNR 20751416; *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on 2007, then click on August, which shows Judge Wilkins has assumed senior status).

64. Barrett, *supra* note 32.

65. Press Release, White House Office of the Press Sec'y, President Obama Nominates Judge Albert Diaz and Judge James Wynn to the Fourth Circuit Court of Appeals (Nov. 4, 2009), available at <http://www.whitehouse.gov/the-press-office/president->

North Carolina's intermediate appellate court for almost twenty years;⁶⁶ Diaz had served on the Superior Court for three years as well as having been Charlotte's first Business Court Judge, serving in that position since 2005.⁶⁷ Both jurists had acquired considerable experience within the military justice system.⁶⁸ In mid-December, Senator Sessions agreed to the unusual practice of furnishing the two nominees a single panel hearing, which Senators Burr and Hagan attended to express their support for the nominees.⁶⁹

In January 2010, the committee unanimously approved the jurists, who then languished on the Senate calendar for months, prompting Senator Hagan's repeated efforts to leverage nominee votes through multiple floor speeches.⁷⁰ Nevertheless, Senator McConnell, the Minority Leader, rebuffed Senator Hagan's pleas and reminded her that the chamber had denied President Bush's nominee for the seat a vote, thereby revealing that payback motivated his position.⁷¹ The Senate eventually confirmed Judge Wynn on August 5, 2010; however, Judge Diaz did not receive chamber approval until

obama-nominates-judge-albert-diaz-and-judge-james-wynn-fourth-circuit-cou; see also Barrett & Johnson, *supra* note 61 (describing the nominations of both judges).

66. See Wright & Morrill, *supra* note 60; Barrett & Johnson, *supra* note 61; Editorial, *Senate Should Confirm Al Diaz, Jim Wynn to Court*, CHARLOTTE OBSERVER (N.C.), Dec. 16, 2009, at 18A.

67. Kirsten Valle, *Among Charlotte Judges, He Gets the Business*, CHARLOTTE OBSERVER (N.C.), Aug. 16, 2008, at 1D; see Wright & Morrill, *supra* note 60; David Ingram, *From District Court Candidate to Circuit Court Nominee*, BLOG OF LEGAL TIMES (Nov. 12, 2009, 4:34 PM), <http://legaltimes.typepad.com/blt/2009/11/from-district-court-candidate-to-circuit-court-nominee.html>.

68. See *Confirmation Hearings on Federal Appointments: Hearings on James A. Wynn Jr. and Albert Diaz to be U.S. Circuit Judges for the Fourth Circuit Before the S. Comm. on the Judiciary*, 111th Cong. 979–80 (Dec. 16, 2009) [hereinafter *Wynn-Diaz Hearings*]; see also Barrett & Johnson, *supra* note 61 (discussing the military background of both Diaz and Wynn); Ingram, *supra* note 54, at 22 (same).

69. *Wynn-Diaz Hearings*, *supra* note 68, at 979, 981–85; see Barbara Barrett, *4th Circuit Nominees Sail in Hearing*, CHARLOTTE OBSERVER (N.C.), Dec. 17, 2009, at 4B; Carl Tobias, *Diaz and Wynn Should be Confirmed for Fourth Circuit*, MCCLATCHY (Dec. 17, 2009), <http://www.mcclatchydc.com/2009/12/17/80843/commentary-diaz-and-wynn-should.html>.

70. 156 CONG. REC. S2272 (daily ed. Apr. 14, 2010) (statement of Sen. Hagan); 156 CONG. REC. S5836 (daily ed. July 14, 2010) (statement of Sen. Hagan); Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary, SENATE.GOV (Jan. 28, 2010), <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da1560d36> (showing a webcast of the panel approval); see 156 CONG. REC. S1572 (daily ed. Mar. 16, 2010) (statement of Sen. Hagan).

71. 156 CONG. REC. S5836 (daily ed. July 14, 2010) (statement of Sen. McConnell); see Savage, *Family Feud*, *supra* note 18; *supra* note 24 and accompanying text.

December, even though the body confirmed him without debate or opposition.⁷²

President Obama consulted South Carolina Republican Senators Lindsey Graham and James DeMint as well as Democratic Representative James Clyburn about the opening that materialized when illness forced Chief Judge Williams to retire.⁷³ In January 2011, the White House nominated District Judge Henry Floyd, whom President George W. Bush had appointed to the United States District Court for the District of South Carolina but refused to elevate, and the Judiciary Committee accorded Floyd a swift hearing and vote.⁷⁴

The four confirmed judges—Davis, Keenan, Wynn, and Diaz—all share particular attributes: they were presently sitting federal or state court judges at nomination; they comprise ethnic minorities or women; and all of the individuals had garnered powerful support from politicians in their jurisdictions who strongly recommended them to President Obama and forcefully advocated their confirmations. Judges Wynn and Diaz had also served in the military justice system. All four had compiled records that suggest they now possess mainstream jurisprudential approaches, especially with respect to ideology. These factors explain their comparatively smooth appointments. Previous judicial service means that nominees provide records that the Senate, the American Bar Association (“ABA”), and citizens may easily access and review. Moreover, the nominees had considerable applicable experience, which permitted them to swiftly, economically, and fairly decide cases. Finally, the ABA Standing Committee on the Judiciary gives most candidates who are sitting judges the highest ranking, “well qualified,” as the bar committee did for these four appointees.⁷⁵

72. 156 CONG. REC. S6971 (daily ed. Aug. 5, 2010); 156 CONG. REC. S10,704 (daily ed. Dec. 18, 2010); Wright & Morrill, *supra* note 60.

73. See Morrill, *supra* note 61; James Rosen, *Obama Nominates S.C. Federal Judge to Appellate Court*, MCCLATCHY (Jan. 27, 2011), <http://www.mcclatchydc.com/2011/01/27/107547/obama-nominates-sc-federal-judge.html#storylink>; *supra* notes 16, 46 and accompanying text.

74. Press Release, White House Office of the Press Sec’y, President Obama Nominates Judge Henry Floyd for the United States Court of Appeals for the Fourth Circuit (Jan. 26, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/26/president-obama-nominates-judge-henry-floyd-united-states-court-appeal>. Bush appointed Floyd mostly at Graham’s recommendation, yet Bush refused to elevate Floyd when the senator proposed that idea. See Rosen, *supra* note 73.

75. AM. BAR ASS’N., STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 7 (1991); Sheldon Goldman, *W. Bush’s Judicial Legacy*, 92 JUDICATURE 258, 274 (2009); see Ingram, *supra* note 54, at 22; Carl Tobias, *Choosing*

B. Critical Evaluation

1. Positive Features

Numerous beneficial dimensions characterized President Obama's Fourth Circuit judicial selection initiatives. Throughout the initial half term, he placed four appointees on a court that had long experienced a number of vacancies and had been operating across thirty months with four, and occasionally five, seats unfilled. The Obama Administration's early and persistent consultation with home state officers, particularly GOP senators, and those lawmakers' insistent championing of the candidates, fostered the candidates' easy nomination and confirmation. Moreover, this strategy limited the rancor, interparty divisiveness, and retribution that had previously pervaded the court's judicial appointments.⁷⁶ The Obama White House set priorities well, choosing to emphasize appellate over district vacancies, given the openings' comparative importance, and emphasizing certain circuits, especially the Fourth and Second, in light of their multiple empty posts.

Now that the Fourth Circuit has almost its total complement of judges, it can decide appeals more swiftly, inexpensively, and equitably. The court's enhanced judicial resources may enable it to furnish considerably more published opinions and oral arguments, and might enable it to rely less on visiting judges.⁷⁷ North Carolina, as the jurisdiction with the largest population, finally has the representation on the court of appeals that many believe it deserves. Republican and Democratic cooperation in judicial selection also improved the process and enhanced citizen respect for appointments, the President, the Senate, and the bench.⁷⁸

Tapping prospects who currently serve as judges correspondingly furnishes numerous advantages. Perhaps most significantly, the nominees possess substantial relevant experience, which means that the individuals can adjust with ease to the pressures of managing large caseloads and will have the requisite expertise to promptly, inexpensively, and equitably conclude appeals. Moreover, the four appointees bring diverse judicial experience, which could facilitate

Federal Judges in the Second Clinton Administration, 24 HASTINGS CONST. L.Q. 741, 752 (1997).

76. Compare *supra* Part I.B, with *supra* Part II.A (comparing earlier difficulties in the selection process with improvements in the Obama years).

77. See *supra* notes 33–34 and accompanying text.

78. See *supra* Part II.A; see also Tobias, *supra* note 14, at 743 (finding that interparty cooperation improves the process and increases citizen respect).

their efforts and the work of their colleagues. Judge Davis served for fifteen years as a federal district court judge, accumulating valuable experience with trial court operations and an appreciation of circuit review.⁷⁹ The other three judges acquired a broad spectrum of pertinent experience in state judiciaries. Judge Keenan was a state supreme court justice for nearly two decades after she had been a judge at all three remaining levels of the Virginia courts; Judge Wynn served on the state intermediate appellate bench for over twenty years; and Judge Diaz functioned as a state trial and business court judge.⁸⁰ Furthermore, Judges Wynn and Diaz accumulated expertise concerning the military justice system that will be useful, as considerable activity regarding national security and the military occurs, and numerous national security and military installations are, within the tribunal's purview.⁸¹

Improving ethnic and gender diversity on the regional circuits also affords multiple benefits. In addition to fulfilling normal judicial responsibilities, these judges frequently help their colleagues understand and resolve daunting issues, such as the death penalty and abortion,⁸² and bring a wide spectrum of perspectives to a variety of fields, including free speech and employment law.⁸³

President Obama's minority and female appointees and nominees could affect ideological diversity to the extent that certain appointees and nominees may favor the ideas of a "living Constitution" or empathy.⁸⁴ It remains unclear whether the Fourth

79. See *supra* text accompanying note 49.

80. See *supra* notes 57, 66–67 and accompanying text.

81. See Barrett, *supra* note 32; *supra* note 68 and accompanying text.

82. 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); Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 19–21 (2001).

83. E.g., Madhavi McCall, *Structuring Gender's Impact*, 36 AM. POL. RES. 264, 290–92 (2008) (finding that women tend to vote differently than their male counterparts in Fourth Amendment cases, even when other political and legal variables are taken into account); Jennifer Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1779–85 (2005) (finding that the presence of a female judge affects whether plaintiffs win in gender discrimination cases, and proposing some possible reasons for this result). A new study of female judges questions these ideas. Stephen Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504, 526 (2011); see Barbara Palmer, "To Do Justly": *The Integration of Women into the American Judiciary*, 34 POL. SCI. & POL. 235, 237 (2001); see also George, *supra* note 82, at 18–25 (reporting the results of studies in which women judges did not perform differently than male judges, across a wide variety of cases).

84. E.g., STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* 73 (2010) (arguing that judges should consider the current social context when interpreting the Constitution); JEFFREY ROSEN, *THE SUPREME COURT* 181–82, 201 (2007) (describing the idea of a living Constitution); Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574,

Circuit appointees hold these views, but little during the nominees' confirmation processes suggests that lawmakers found the judges' perspectives problematic. The jurists have not decided enough appeals, especially implicating controversial matters, to ascertain their perspectives. The resolution of cases challenging the Affordable Care Act might elucidate their viewpoints,⁸⁵ but definitive conclusions will require the disposition of more appeals respecting a broader spectrum of questions across a considerably longer period. Insofar as the appointees enhance ideological diversity, President Obama could justify this because his Republican counterparts selected numerous conservatives and majorities who serve on a number of circuits,⁸⁶ and his administration deemphasized ideology.⁸⁷

Persons of color and women might also limit the ethnic, gender, and other types of bias that may exist in the judicial process.⁸⁸ A

1649–50 (1987) (arguing that emotion and social circumstances should play a role in the interpretation of legal texts). *But see* ANTONIN SCALIA, A MATTER OF INTERPRETATION 23–25 (1997) (arguing that interpretation should be driven by the plain meaning of the words, not by considerations outside of the language of the text); Curt Levey, *Living Constitution, R.I.P.*, NAT'L REV. ONLINE (Sept. 30, 2005, 4:09 PM), <http://old.nationalreview.com/comment/levey200509301609.asp> (arguing that judicial activism is waning).

85. *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611, 630–47 (W.D. Va. 2010); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 770 (E.D. Va. 2010). For analysis of the three-judge panel, which included Judge Wynn, that heard the two appeals, see Kevin Sack, *Appellate Court Hears Defense of Health Law*, N.Y. TIMES, May 11, 2011, at A17; David Savage, *Healthcare Law Gets Friendly Hearing in Appeals Court*, L.A. TIMES, May 11, 2011, at 9.

86. Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living Up to Them?*, 7 FORUM: J. APPLIED RES. CONTEMP. POL., no. 1, 2009, at 1, 6–8; Russell Wheeler, *How Might the Obama Administration Affect the Composition of the U.S. Courts of Appeals?*, BROOKINGS INST. (Mar. 18, 2009), http://www.brookings.edu/opinions/2009/0318_courts_wheeler.aspx.

87. Obama may believe that the political branches can better adopt social change than unelected judges. Toobin, *supra* note 37, at 45; Justin Driver, *Obama's Law*, THE NEW REPUBLIC, June 30, 2011, <http://www.tnr.com/article/politics/magazine/89647/obama-legal-philosophy-laurence-tribe>. Justice Sotomayor and some lower court nominees have disavowed empathy. 155 CONG. REC. S11,275 (daily ed. Nov. 9, 2009) (statement of Sen. Sessions); see Lauren Collins, *Number Nine*, THE NEW YORKER, Jan. 11, 2010, at 42, 44–45. The popular press is replete with crudely instrumental analysis of how Obama may drastically realign ideology. *E.g.*, Bishop, *supra* note 23 (“U.S. Courts due for Left Turn”); Markon & Murray, *supra* note 37 (explaining that Democrats now have “control” of two circuits because of Obama appointments); Wilkinson, *supra* note 54 (expressing fear that ideology will be the primary criterion for filling Fourth Circuit vacancies). See generally Tobias, *supra* note 36 (assessing Fourth Circuit and ideology).

88. See, e.g., FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990), available at [www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/\\$file/repfsc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/$file/repfsc.pdf); NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS AND ETHNIC FAIRNESS, FINAL REPORT 6–9 (1997).

bench that reflects America inspires greater public confidence than one that does not.⁸⁹ Moreover, expanding diversity reinforces the administration's commitment to improving conditions for people of color and women in the legal practice, the justice system, and the nation.⁹⁰ It also demonstrates that an attorney of any ethnicity or gender can be appointed. These concepts might have particular applicability to the Fourth Circuit because a larger percentage of African Americans live in the court's jurisdiction than any other tribunal.⁹¹ Furthermore, mounting numbers of Latinos and additional ethnic minorities, including Asian Americans, reside within the circuit.⁹²

2. Negative Features

President Obama's judicial selection activities have yielded numerous benefits, but a few dimensions merit enhancement. One pressing need is speed: nominations and appointments progressed less swiftly than was optimal. For example, the President confirmed a lone Fourth Circuit judge during 2009,⁹³ and this happened in November; further, he submitted merely two nominations prior to that month,⁹⁴ while there were 100 vacancies nationally at the end of 2010.⁹⁵ Moreover, the White House did not tap someone until 2011 for the prolonged South Carolina opening.⁹⁶

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

90. Carl Tobias, Essay, *Dear President Bush: Leaving a Legacy on the Federal Bench*, 42 U. RICH. L. REV. 1041, 1048 (2008); see George, *supra* note 82, at 18–25.

91. Press Release, White House Office of the Press Sec'y, President Clinton Appoints Roger Gregory to the United States Court of Appeals for the Fourth Circuit (Dec. 27, 2000), available at http://clinton4.nara.gov/WH/new/html/Fri_Dec_29_135529_2000.html; Ingram, *supra* note 54, at 22; Sherilynn Ifill, *Storming the Court?*, THE ROOT (Nov. 18, 2009, 6:43 AM), <http://www.theroot.com/views/storming-court>.

92. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011 25 tbl.19 (2011), available at <http://www.census.gov/compendia/statab/2011/tables/11s0019.pdf>; Carol Morello & Dan Keating, *Minority Ranks Boom in Virginia*, WASH. POST, Feb. 4, 2011, at A1.

93. See *supra* notes 50–53 and accompanying text.

94. See *supra* notes 50, 56, 65 and accompanying text.

95. See *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on 2010, then scrolling to December 2010, where vacant seats are listed); *supra* Part II.B. and accompanying text.

96. See *supra* notes 73–74 and accompanying text.

To the extent Fourth Circuit nominations and confirmations were protracted, President Obama deserves some responsibility. A few ideas might explicate tardy nomination. Consultation facilitated appointments, yet the practice consumed substantial time and demanded care. Politicians' application of selection commissions to search for, analyze, and proffer candidates; the elected officials' assessments of panel recommendations, choices from those recommendations, and negotiations with the administration; and the White House decisions and nominations required significant time. A valuable illustration was the delicate process of reassigning North Carolina the judgeship formerly allocated to South Carolina.⁹⁷

Some responsibility for delayed appointments can be ascribed to Republican senators, who often cooperated less than they could have. For instance, the GOP automatically held over Judiciary Committee votes seven days, absent convincing reasons, for nominees whom the panel reported at the subsequent meeting. This happened with the four appointees, but it was especially telling for Justice Keenan, as Senator Sessions had praised her substantial capabilities at her hearing, yet then he requested that she be held over. The court desperately required new members because it had five vacancies at that time.⁹⁸

The primary bottleneck was the Senate floor. Practically half of the twenty-two nominees approved by the committee had no floor debates or votes in 2009, while only three appellate nominees were confirmed. The process was similar in 2010: Senator Reid attempted to cooperate with Senator McConnell and others in the Republican party but he enjoyed minimal success. In 2009, Senator McConnell opposed floor debate on nominees until Supreme Court Justice Sonia Sotomayor was appointed, which meant that the initial circuit prospect was not approved until September, and he rarely entered time accords on votes.⁹⁹ Senator Leahy contended that Republicans

97. See *supra* notes 63–64 and accompanying text; see also *infra* notes 157–59 and accompanying text (describing a similar situation that may benefit from a similar solution in California).

98. See *supra* notes 46, 53, 58 and accompanying text. For the other three, see Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary, SENATE.GOV (Jan. 21, 2010), <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da155cbdd> (showing a webcast of the statement of Sen. Sessions); Carl Tobias, *With Obama Proceeding Reasonably to Fill Federal Judgeships, the Bottleneck is the Senate*, FINDLAW (Oct. 30, 2009), http://writ.news.findlaw.com/commentary/20091030_tobias.html.

99. See 155 CONG. REC. S13,244–46 (daily ed. Dec. 15, 2009) (statement of Sen. Patrick Leahy); Fletcher, *supra* note 52. For McConnell and Sotomayor, see Alex Leary,

forced Democrats to squander months in pursuit of temporal agreements for considering nominees who eventually won smooth approval.¹⁰⁰ This occurred with each Fourth Circuit appointee, but Judge Diaz's treatment proved most egregious. He received nomination in November 2009 and confirmation in December 2010, waiting longer than all remaining Obama circuit appointees, despite being well qualified and uncontroversial.

Republicans have insisted upon extensive floor debate time—but ultimately employed little of it—and roll call votes for nominees whom they overwhelmingly approved. A pellucid example is Eleventh Circuit Judge Beverly Martin, for whom the GOP insisted on an hour but needed ten minutes, after which she captured appointment ninety-seven to zero.¹⁰¹ The unanimous consent mechanism permits one senator to delay the body, while anonymous holds preclude the evaluation of specific nominees on the merits. Invocation of holds for qualified, uncontroversial nominees has traditionally been extremely rare, as it forces their proponents to submit cloture petitions, wastes scarce time, prolongs vacancies, and lengthens appeals' disposition.¹⁰²

The machinations regarding Judges Keenan and Diaz illustrate those phenomena. Keenan, who is a well-qualified, uncontroversial jurist, waited four months to be approved by identical ninety-nine to zero cloture and merits votes.¹⁰³ Diaz—who is uncontroversial, had

Supreme Court Seat Not the Only One Empty, ST. PETERSBERG TIMES (Fla.), Aug. 5, 2009, at 1A, available at 2008 WLNR 1516812; see also Letter from Prof. Bruce A. Ackerman et al., to President Obama (Feb. 24, 2010), available at <http://media.washingtonpost.com/wpsrv/politics/documents/lettertopresidentobama022410.pdf> (criticizing delayed Senate consideration of Obama nominees).

100. 155 CONG. REC. S13,244–46 (daily ed. Dec. 15, 2009) (statement of Sen. Patrick Leahy).

101. 155 CONG. REC. S10,753–54 (daily ed. Oct. 27, 2009) (statements of Sens. Sessions and Cardin); see 156 CONG. REC. S13–18 (daily ed. Jan. 20, 2010) (statement regarding Martin debate and confirmation).

102. Doug Kendall, *The Bench in Purgatory: The New Republican Obstructionism on Obama's Judicial Nominees*, SLATE (Oct. 26, 2009, 9:34 AM), www.slate.com/id/2233309; see 155 CONG. REC. S13,244–46 (daily ed. Dec. 15, 2009) (statement of Sen. Patrick Leahy); Victor Williams & Nicola Sanchez, *Confirmation Combat*, NAT'L L. J., Jan. 4, 2010, at 34, 34.

103. 156 CONG. REC. S904–10 (daily ed. Mar. 2, 2010) (Keenan debate and confirmation); Norman Orenstein, *A Filibuster Fix*, N.Y. TIMES, Aug. 28, 2010, at A19; Doug Kendall, *Confirmation Warriors: What's the Endgame for Obama's Judicial Nominees?*, SLATE (Oct. 8, 2010, 11:29 AM), <http://www.slate.com/id/2270327>. But see 156 CONG. REC. S519 (daily ed. Feb. 9, 2010) (statement of Sen. Sessions) (defending the procedural actions of the Republicans throughout the nominations). Cloture may inflame the GOP and worsen delay. Dana Milbank, *Filibusted*, WASH. POST, Nov. 18, 2009, at A2;

assembled an excellent record, garnered full committee approval in January 2010, and secured nomination to the Fourth Circuit (which had many protracted openings during 2009)—waited across 2010 only to receive unanimous confirmation without debate.¹⁰⁴ Fewer appeals court judges won appointment throughout President Obama's initial year than during the last four Presidents' terms, and circuit approval consumed over eight months; however, 2010 was better.¹⁰⁵

President Obama and the Senate lacked the ability to fully control several of the factors that explain the tardy nominations and appointments. Promptly filling Justice David Souter's vacancy was critical and basically precluded lower court activities, while similar urgency permeated the selection of Justice John Paul Stevens's replacement.¹⁰⁶ Moreover, the White House faced the "start-up" costs entailed in effectuating a new government. During 2009, and much of the next year, the chamber failed to confirm a number of Assistant Attorneys General candidates, especially for the Department of Justice Office of Legal Policy, which has major judicial selection

Carl Tobias, *Ending 'Confirmation Wars'*, BALT. SUN, Nov. 30, 2009, at 15A, available at http://articles.baltimoresun.com/2009-11-30/news/bal-op.confirmation30nov30_1_confirmation-wars-district-judge-david-hamilton-district-court-record; see David Fontana, *Going Robe: Obama's Judicial Appointment Strategy Isn't Working. Here's a New One.*, THE NEW REPUBLIC (Dec. 17, 2009, 12:00 AM), <http://www.tnr.com/article/environment-energy/going-robe>.

104. 156 CONG. REC. S5837 (daily ed. July 14, 2010) (statement of Sen. Hagan); Wright & Morrill, *supra* note 60; Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary, SENATE.GOV (Jan. 28, 2010), <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da1560d36> (showing a webcast of the panel approval); *Judicial Nominations*, U.S. DEP'T OF JUSTICE ARCHIVES, <http://www.justice.gov/archive/olp/judicialnominations111.htm> (last updated Aug. 2011); Carl Tobias, *Commentary: Senate Should Confirm Judge Diaz Before Recess*, MCCLATCHY (Sept. 28, 2010), <http://www.mcclatchydc.com/2010/09/28/101247/commentary-senate-should-confirm.html#storylink=misearch>.

105. The 2009 lower court appointees were the fewest in 50 years. David Ingram, *Slow Going in Senate for DOJ, Judicial Nominees*, NAT'L L.J., Jan. 4, 2010, at 17, 20; Fontana, *supra* note 103. For the confirmation time, see *Judicial Nominations*, U.S. DEP'T OF JUSTICE ARCHIVES, <http://www.justice.gov/archive/olp/judicialnominations111.htm> (last updated Aug. 2011). *But see* 156 CONG. REC. S6484 (daily ed. July 20, 2010) (statement of Sen. Sessions); Russell Wheeler, *Judicial Nominations: Into the Home Stretch* BROOKINGS INST. (Sept. 27, 2010), http://www.brookings.edu/opinions/2010/0927_judicial_nominations_wheeler.aspx (arguing that Obama circuit nominees have gotten more hearings, more quickly than did Bush nominees). Obama's confirmation rate was the lowest in 35 years. See Markon & Murray, *supra* note 37.

106. See Tobias, *supra* note 37, at 780; see also *supra* note 99 and accompanying text (describing how the Senate refrained from floor debate on appellate court nominees until Sonia Sotomayor was appointed).

responsibility.¹⁰⁷ President Obama was also addressing numerous intractable complications, such as the drastic recession, Guantanamo, and the Iraq and Afghanistan conflicts.¹⁰⁸

III. LESSONS FROM FOURTH CIRCUIT JUDICIAL SELECTION

A. *The Obama Administration's Selection*

The Obama Administration's Fourth Circuit judicial appointments effort resembled its selection initiatives nationwide. The President has meticulously consulted with, and depended on, home state elected officials when nominating and appointing candidates. Most officers have relied on selection commissions or bar associations to screen and propose talented individuals, while the legislators have systematically and persuasively advocated on behalf of the candidates tendered, once nominated. The specific procedures deployed yield capable appointees, who bring considerable salient practical experience as judges, secure the highest ABA rankings, increase ethnic and gender diversity, and win confirmation. President Obama has realized much success when filling numerous protracted vacant appellate seats, including the country's longest. Fewer accusations and paybacks, as well as less strident division and partisanship have concomitantly attended confirmation.

Many of those dimensions have proved beneficial, although certain factors were not so positive. The White House initiatives to foster bipartisanship and consensus enjoyed mixed success, in part because Republicans did not reciprocate, and the efforts imposed direct expense respecting speed and compromise. Aggressive consultation with lawmakers and their adoption of panels required time and slowed the process. Consultation and the deference

107. Sheldon Goldman, et al., *Obama's Judiciary at Midterm*, 94 JUDICATURE 262, 264–65 (2011); Peter Baker, *Obama Team Lacking Most of the Top Players*, N.Y. TIMES, Aug. 24, 2009, at A1; Carl Tobias, *Commentary: Confirming Christopher Schroeder for DOJ OLP*, MCCLATCHY (Apr. 21, 2010), <http://www.mcclatchydc.com/2010/04/21/92567/commentary-confirming-christopher.html>; see Wil S. Hylton, *Hope. Change. Reality.*, GENTELMAN'S Q., Dec. 2010, at 180, 180; Al Kamen, *The Judicial Waiting Game*, WASH. POST, Aug. 4, 2010, at A15; Ed O'Keefe, *Obama Criticizes Holds Placed On His Nominees*, WASH. POST, Feb. 4, 2010, at A15; Seth Stern, *Bench-Clearing Brawl Continues*, CQ WEEKLY, Sept. 27, 2010, at 2212, 2212–13.

108. See, e.g., Peter Baker, *L.B.J. All the Way?*, N.Y. TIMES, Aug. 23, 2009, at WK1; John Burns, *Obama Promises the World a Renewed America*, N.Y. TIMES, Jan. 21, 2009, at P24; Thomas L. Friedman, *Finishing Our Work*, N.Y. TIMES, Nov. 5, 2008, at A35; Eric Schmitt, *U.S. Will Expand Detainee Review in Afghan Prison*, N.Y. TIMES, Sept. 13, 2009, at A1.

accorded lawmakers may have restricted President Obama's ability to nominate and seat the kinds of jurists he apparently prefers and thus, to mold the circuit judiciary.¹⁰⁹ The White House was so deferential to politicians from states in which vacancies occurred that it arguably ceded a measure of administration selection power, as evidenced by the politicians' willingness to recommend one, not multiple, names in contravention of a several decade practice.¹¹⁰ The Maryland and Virginia legislators' action was emblematic: they flouted convention by proposing a single candidate.¹¹¹ These factors led the White House to nominate more slowly than was ideal, especially during 2009.

The reluctance of the GOP as a caucus, and of specific politicians, to coordinate nominations and confirmations, as well as their seeming propensity to stall by holding over panel votes seven days; placing anonymous holds on competent, uncontroversial candidates; rejecting temporal agreements; and demanding many roll call votes has wasted scarce time, increased the number of vacancies, and extended the period that openings stay unoccupied. This GOP recalcitrance has been exacerbated by Democrats' reluctance to make the appointments problem a political issue. For instance, the White House and the Majority Leader have essentially subordinated judicial confirmations to Democrats' legislative agenda. Because of these phenomena, Democrats have only invoked cloture four times. Furthermore, the administration has evinced reluctance to employ dramatic practices, such as recess appointments and proffering candidates for all of the vacancies. The Fourth Circuit appointees waited nine months from nomination to confirmation and six months from approval in the committee to appointment.

The White House also established priorities less well than it might have. For example, the time devoted to Fourth Circuit openings, albeit required because of the numerous empty seats, may have drained resources from addressing other unfilled judgeships. Indeed, during October 2009, the Second Circuit had a larger percentage of vacancies than the Fourth Circuit. All of the Second Circuit vacancies were "judicial emergencies," and three of them lacked nominees. Furthermore, the courts experienced 100 unoccupied appellate and district judgeships nationwide and had four

109. President Obama's views on these issues remain unclear. *See supra* note 87 and accompanying text. For more analysis of Obama's views on judicial selection, see Driver, *supra* note 87; Fontana, *supra* note 103; Ifill, *supra* note 91; Kendall, *supra* note 102.

110. *See, e.g.*, GOLDMAN, *supra* note 5, at 173; Tobias, *supra* note 37, at 778–79.

111. *See supra* notes 48, 56 and accompanying text.

more circuit seats vacant in September 2011 than when President Obama assumed the presidency.¹¹²

The Fourth Circuit appointments moved swiftly compared to some courts. However, the White House nominated less quickly than observers considered ideal, particularly in 2009, despite the fact that individual judges tendered much earlier advance notice of their intent to assume senior status or retire than is customary. The administration failed to make choices for pairs of Ninth, Tenth and District of Columbia Circuit openings and for three empty positions on the Second Circuit.¹¹³ Furthermore, it was unable to nominate District Judge Mary Murguia for Ninth Circuit Judge Michael Daly Hawkins's vacancy, until over a year after he assumed senior status, even though Hawkins proffered notice fifteen months before.¹¹⁴ Similar inaction plagued nomination of a replacement for retiring Eleventh Circuit Judge Stanley Birch.¹¹⁵

The conduct of Republicans, primarily Senator McConnell's avoidance of time concords and other senators' invocation of anonymous holds for capable, uncontroversial nominees, had detrimental effects. The measures protracted selection, occasionally requiring cloture and using precious floor time; abrogated the last

112. *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on 2009, then scrolling to October 2009, where vacant seats are listed). The administration emphasized the Fourth because of its "judicial emergencies," which are defined as all appellate vacancies (1) in which adjusted filings per panel exceed 700 or (2) in existence over 18 months having adjusted filings between 500 and 700. *Id.* In October 2009, the Fourth had three and the Second had four. *Id.* See generally RUSSELL WHEELER & SARAH A. BINDER, BROOKINGS INST., DO JUDICIAL EMERGENCIES MATTER? NOMINATION AND CONFIRMATION DELAY DURING THE 111TH CONGRESS (2011), available at http://www.brookings.edu/papers/2011/0216_judicial_emergencies_wheeler_binder.aspx (explaining the term "judicial emergencies" and its impact on the 111th Congress).

113. *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on each month in 2009 and observing that the administration failed to fill the same two seats in the Ninth, Tenth and District of Columbia Circuits, and the same three seats in the Second Circuit, for the entire year).

114. Carol J. Williams, *Obama Nominates Arizona Judge to Court of Appeals*, L.A. TIMES, Mar. 27, 2010, at AA1; *Archive of Judicial Vacancies*, *supra* note 2 (found by accessing March 2009 and following through to March 2011).

115. See Bill Rankin, *Birch to Retire from Appeals Court in August*, ATLANTA J.-CONST., Jan. 5, 2010, at B3; Andrew Cohen, *Judge Stanley Birch: A Hero Says Goodbye*, VF DAILY (Jan. 5, 2010, 3:22 AM), <http://www.vanityfair.com/online/daily/2010/01/judge-stanley-birch-a-hero-says-goodbye.html>; Bill Rankin, *Obama Has a New Vacancy to Fill on Atlanta Appeals Court*, ATLANTA J.-CONST. (Feb. 25, 2011, 5:37 PM), <http://www.ajc.com/news/atlanta/obama-has-a-new-853234.html>. Obama recently nominated Judge Adalberto José Jordán. Press Release, White House Office of the Press Sec'y, President Obama Nominates Judge Adalberto José Jordán to the United States Court of Appeals (Aug. 2, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/08/02/president-obama-nominates-judge-adalberto-jos-jord-n-united-states-court>.

vestige of civility; and exacerbated the confirmation wars. This effectively forced nominees to place their lives on hold, stopped very capable potential candidates from considering judicial service, and deprived appellate courts of resources that they desperately needed, thus impairing appeals' prompt, economical, and fair treatment—phenomena manifested in Fourth Circuit statistics respecting published opinions and oral arguments—and diminishing citizen regard for appointments and the national government's branches.

The selection of present judges offers benefits, especially in terms of experience, yet may have downsides too. Numerous observers, including the late Chief Justice William Rehnquist, have wondered about the efficacy of a career federal judiciary, which is akin to that in many European nations.¹¹⁶ Critics mostly rely on the American convention that draws judges from a plethora of sources, namely private practice, prosecutors and public defenders, and legal academics, who can supply a number of perspectives and expertise across a broad spectrum. Opponents voice the concern that promoting more jurists will additionally bureaucratize the judiciary, which they find over-bureaucratized already.¹¹⁷ The Fourth Circuit appointees, who were sitting court members at nomination, minimally increase circuit diversity of experience.

Observers have identified certain attributes that characterize the Fourth Circuit appointees. A few comment that one is under fifty-five years old, and pointedly assert that GOP success in confirming young judges now offers longevity on appellate tribunals and experienced candidates when Supreme Court Justices retire.¹¹⁸ Additional critics

116. Seth Stern, *A Career as Federal Judge Isn't What It Used to Be*, CHRISTIAN SCI. MONITOR, Jan. 22, 2002, at I, 1. For analysis of a "career judiciary," see RUSSELL WHEELER, BROOKINGS INST., *THE CHANGING FACE OF THE FEDERAL JUDICIARY 7-9* (2009), available at http://www.brookings.edu/~media/Files/rc/papers/2009/08_federal_judiciary_wheeler/08_federal_judiciary_wheeler.pdf; Sheldon Goldman et al., *W. Bush: Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282, 305 (2003).

117. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 114-19 (1985); Ashby Jones, *Scalia in Mississippi: Stop With The Judges Already*, WALL ST. J. L. BLOG (Jan. 5, 2010, 1:37PM), <http://blogs.wsj.com/law/2010/01/05/scalia-in-mississippi-stop-with-the-judges-already> (assessing Justice Scalia's concern with the lack of professional backgrounds on the courts); see JONATHAN ANDREW COHEN, *INSIDE APPELLATE COURTS* 1-19 (2002). See generally Owen Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983) (attributing the bureaucratization to the growing size and complexity of American society); Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648 (1980) (explaining how the number of cases is a cause of the bureaucratization).

118. David Fontana & Micah Schwartzman, *Old World: Why Isn't Obama Appointing Young Judges to the Circuit Courts?*, THE NEW REPUBLIC (July 17, 2009, 12:00AM), <http://www.newrepublic.com>

have pondered the appointees' ideological views, essentially intimating that the jurists are overly liberal or too conservative. Some do urge greater balance, arguing that Republican opposition, even to moderate prospects, shows compromise on ideology is unprofitable, while GOP Presidents aggressively named conservatives, specifically alleging they had popular mandates to supplement conservatism on the judiciary.¹¹⁹

B. Comparison of President Obama and Prior Administrations

Perhaps most striking about President Obama's Fourth Circuit endeavors is his remarkable success when filling the prolonged unoccupied seats, especially how dramatically he eclipsed his predecessors' efforts. For instance, the four candidates whom President Clinton submitted from North Carolina failed to even receive votes, while President Bush left four vacancies at his presidency's conclusion.

The Obama Administration's selection policies both resemble and depart from those of other Presidents. President Obama, as each modern President has done, has centralized Supreme Court and circuit appointments in the White House, but he evinced greater deference toward both parties' senators in nominating appellate candidates, a feature that has realized more benefits than detriments.¹²⁰ President Obama's reliance on the Department of Justice in helping nominees prepare for Senate analysis is like that of all contemporary administrations.

Particular strictures that President Obama employed resemble the measures that President Clinton used. Both administrations sought to practice greater consultation and bipartisanship. Their White Houses concomitantly displayed greater amenability to canvassing, nominating, and appointing less ideological and more consensus candidates; rigorously emphasized individuals' merit, and

//www.tnr.com/article/politics/old-world; Micah Schwartzman, *Not Getting Any Younger: President Obama's Penchant for Older Judges Scuttled Goodwin Liu*, SLATE (May 26, 2011, 6:04 PM), <http://www.slate.com/id/2295597/>; see George, *supra* note 82, at 16–18.

119. See, e.g., Ingram, *supra* note 54, at 19; Markon & Murray, *supra* note 37; Charlie Savage, *Appeals Courts Pushed to Right by Bush Choices*, N.Y. TIMES, Oct. 29, 2008, at A1; Fontana, *supra* note 103; Ifill, *supra* note 91. Ethnic and gender diversity have many positive features. However, a few observers have challenged the advisability of emphasizing this diversity, couching their arguments primarily in terms of merit and limitations on other forms of diversity, ideas that the “Wise Latina” controversy reflects. See Collins, *supra* note 87, at 42.

120. See *supra* notes 48, 56, 63–64 and accompanying text.

ethnic and gender diversity; and restricted the politicization of the selection process.¹²¹

President Obama also differs from recent chief executives. For instance, his administration has steadily nominated candidates, deploying press releases to announce a few candidates simultaneously.¹²² This technique improves on the practice of President George W. Bush and President Clinton. Bush and Clinton both submitted large designee packages at Senate recesses, a practice that invariably frustrated efficient chamber analysis.¹²³ Moreover, this White House has insisted on depoliticizing the selection process. For example, Justice Sotomayor and Justice Kagan are the lone nominees whom President Obama personally introduced.¹²⁴ His approach effectively contrasts with the Bush Administration's use of the White House for a ceremony publicizing its first group of appeals court nominees, who attended the session.¹²⁵ President Obama's conciliatory actions, particularly respecting the Fourth Circuit, also significantly diverge because he pledged to stop the relentless confirmation wars partly through assertive consultation with senators in both parties, and through the submission of able, diverse, consensus candidates.

121. See generally Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276 (1995) (covering the process of Clinton's selections for appellate judges); Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741 (1997) (explaining Clinton's system for selecting well-qualified uncontroversial judges).

122. See, e.g., *supra* notes 50, 65 and accompanying text.

123. See *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on each month in 1997 and each month in 2001 to see that large numbers of candidates were nominated during Senate recesses during these years).

124. Shailagh Murray & Michael D. Shear, *First Latina Picked for Supreme Court; GOP Faces Delicate Task in Opposition*, WASH. POST, May 27, 2009, at A1; Sheryl Gay Stolberg, *A Trailblazer and a Dreamer*, N.Y. TIMES, May 27, 2009, at A1; see Press Release, White House Office of the Press Sec'y, Remarks by the President and Supreme Court Justice Sonia Sotomayor at Reception in Her Honor (Aug. 12, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-and-Justice-Sotomayor-at-reception-in-her-honor/. Personal introductions are fitting for Supreme Court nominees.

125. Neil A. Lewis, *Bush Appeals for Peace on His Picks for the Bench*, N.Y. TIMES, May 10, 2001, at A29; Charlie Savage, *Obama Backers Fear Opportunities to Reshape Judiciary Are Slipping Away*, N.Y. TIMES, Nov. 15, 2009, at A20; see Goldman, *supra* note 121, at 283.

IV. RECOMMENDATIONS FOR THE FUTURE

A. *General Suggestions*

This review of the Fourth Circuit selection process ascertains that President Obama and the 111th Senate implemented multiple effective techniques to facilitate the confirmation of talented judges. However, this Article finds that nominees might be considered with greater speed, especially in light of the numerous protracted vacancies. The final section, thus, analyzes practices for swiftly confirming appellate judges.

President Obama's Fourth Circuit selection measures have proved very successful, filling empty positions that have long impeded tribunal operations and surpassing efforts in other courts of appeals, particularly the District of Columbia, Second, Ninth, Tenth, and Eleventh Circuits. Accordingly, the President and the Senate must continue relying on the procedures that have displayed efficacy, adjust or terminate less workable solutions, institute new mechanisms which have potential, and redouble efforts in courts that now experience multiple vacancies, lengthy unfilled seats, or deadlocks.

1. The Nomination Process

The Obama Administration initiatives were generally effective. For instance, vigorous consultation with elected officials in each party has facilitated nomination and confirmation and should proceed. Seeking input before nomination, as well as cooperation and assistance thereafter from GOP officers, has been especially productive. Senator Burr's particular championing of Judges Wynn and Diaz may have fostered their nomination and confirmation,¹²⁶ just as coordination with Senators Graham and DeMint prompted the fine South Carolina nomination.¹²⁷ Arizona Republican Senators Jon Kyl and John McCain enthusiastically and persuasively supported the nomination of Judge Murguia, promising to shepherd her through the Ninth Circuit appointments process.¹²⁸ Utah Senator Orrin Hatch (R-Utah) proposed that University of Utah College of Law Professor Scott Matheson be nominated. He deftly reassured Kyl when Kyl

126. See *supra* note 69 and accompanying text.

127. See *supra* notes 73–74 and accompanying text.

128. Carol J. Williams, *Judge Confirmed to 9th Circuit*, L.A. TIMES, Dec. 23, 2010, at AA5; *Statement of the Honorable Patrick Leahy, United States Senator, Vermont*, SENATE.GOV (July 15, 2010), http://judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da16032eb&wit_id=e655f9e2809e5476862f735da16032eb-0-0.

expressed doubts regarding certain of Matheson's views, which prompted the Arizona legislator to favor Matheson.¹²⁹

In contrast, for situations where the administration did not consult, especially the Oklahoma appellate court vacancy,¹³⁰ it must attempt to repair the circumstances, open dialogue, and perhaps search for consensus candidates. Pursuing this advice and cooperation from elected officials should be particularly worthwhile in jurisdictions that have two Republican senators, such as Kansas and Georgia, or in tribunals with more than one vacancy or prolonged openings, especially the District of Columbia, Second, Ninth, Tenth, and Eleventh Circuits.

The panels and bar groups that senators institute have proved constructive and ought to be employed, but implementation requires time and the groups can lack transparency, as the commission that Senator Hagan applied may suggest.¹³¹ Accordingly, politicians should evaluate panels that have been successful—including the ones that California used throughout the George W. Bush Administration and continues to use, and that Wisconsin has relied on for decades—and recalibrate the panels, if necessary.¹³²

129. Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary, SENATE.GOV (June 10, 2010), <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da15e951b> (showing a webcast of the exchange between Sens. Hatch and Kyl); see Thomas Burr, *Obama Nominates Scott Matheson to Circuit Court: Utahn Is Praised for Legal And Academic Credentials*, SALT LAKE TRIB., Mar. 4, 2010, available at 2010 WLNR 4537439.

130. Jim Myers, *Court Vacancy Causes Stir*, TULSA WORLD, May 23, 2010, at A1, available at http://www.tulsaworld.com/news/article.aspx?subjectid=16&articleid=20100523_16_a1_washin822076; see Chris Casteel, *Judicial Nominee Praised for His Work; Opposed by Oklahoma's Senators*, OKLAHOMAN, Feb. 27, 2011, at 1A, available at <http://newsok.com/judicial-nominee-praised-for-his-work-opposed-by-oklahomas-senators/article/3544300>.

131. See *supra* note 61 and accompanying text.

132. California kept the panel, which Democratic Senators Dianne Feinstein and Barbara Boxer employed. Bob Egelko, *Feinstein Taps Bipartisan Panels to Pick Judge Candidates*, S.F. CHRON., Jan. 5, 2009, at B1. The Wisconsin commission vets applicants from whom senators pick. HERB KOHL & RUSSELL D. FEINGOLD, WISCONSIN FEDERAL NOMINATING COMMISSION CHARTER (2008), available at http://www.judicialselection.us/uploads/documents/WI_charter_D88C3BA6A5469.pdf. See generally RUSSELL WHEELER & REBECCA LOVE KOURLIS, BROOKINGS INST., OPTIONS FOR FEDERAL JUDICIAL SCREENING COMMITTEES (2010), available at http://www.brookings.edu/~media/Files/rc/papers/2010/0702_federal_judicial_wheeler/0702_federal_judicial_wheeler.pdf (discussing options for federal judicial selection screening committees to encourage efficiency). A panel resembling President Jimmy Carter's approach may warrant review. See GOLDMAN, *supra* note 5, at 238–50. See generally BERKSON & CARBON, *supra* note 11 (evaluating the U.S. Circuit Judge Nominating Commission during under Carter).

The administration tapped possibilities for specific vacancies—particularly in the District of Columbia, Ninth, Tenth, and Eleventh Circuits—more slowly than was optimal. Therefore, the White House should employ practices, such as commitment of greater resources that will prompt faster nominations, thus according the chamber an adequate supply of designees to promote smooth processing and confirmations. The administration might contemplate assigning circuit judicial appointments somewhat higher priority, especially vis-à-vis the congressional agenda, which has proved less ambitious in the 112th Senate, partly because Republicans enjoy a House majority and increased numbers of Senate members. President Obama appropriately exercised caution, seemingly appreciative that one mistake, particularly submission of a nominee who can appear insufficiently competent or ethical, will frustrate or even halt selection.¹³³

2. The Confirmation Process

Appointments proceeded more slowly than necessary, and this problem allowed substantial vacancies. The confirmations of Judges Davis and Keenan, however, actually proceeded quickly, especially in contrast to a few nominees, despite the lack of GOP cooperation.¹³⁴ The Obama Administration has carefully attempted to communicate fully after making nominations, while it has consulted and cultivated senators, particularly Republican members. This has been valuable in directly expediting appointments and should continue. Notwithstanding the approval of most nominees, including Fourth Circuit appointees Wynn, and especially Diaz, confirmation progressed less quickly than was appropriate.¹³⁵

The Judiciary Committee majority has facilitated the consideration of nominees by attempting to cooperate with Republicans and scheduling prompt assessments, hearings, and votes. The Democrats' willingness to accommodate the GOP request that the panel conduct a 2011 hearing for Ninth Circuit nominee Goodwin Liu—a University of California, Berkeley, School of Law Professor—whom the Republicans deemed controversial is illustrative. However,

133. For example, President Obama submitted no nominee who earned a rating of less than qualified by the ABA. *See* Tobias, *supra* note 37, at 769–70; *see also supra* notes 19–26 and accompanying text (discussing President Bush's nominations).

134. *Compare supra* notes 48–59 and accompanying text, *with supra* notes 60–72 and accompanying text (comparing quick appointment of Judges Davis and Keenan with slower appointment of Judges Wynn and Diaz).

135. *See supra* note 72 and accompanying text.

last year Republicans extensively questioned Liu in a marathon hearing, and then returned him to the White House.¹³⁶ Nevertheless, the committee minority has exercised its prerogative to hold over nominees for one week absent cogent explanations in a virtually automatic manner, fostering some delay. Thus, the minority ought to decrease routine dependence on the procedure by seeking additional time only when there is a clear need for greater information on a particular candidate. A request by Senator Charles Grassley (R-Iowa), the ranking member, to hold over nominees set for panel votes at the 112th Senate's first Executive Business Meeting is an excellent example. It provided Senator Mike Lee (R-Utah), a new GOP committee member, added time to evaluate the candidates.¹³⁷

The chief bottleneck has been the Senate floor. Senator Reid has vigorously attempted to coordinate in scheduling floor debates and votes with the Republican leadership, namely Senator McConnell, but he usually did not cooperate, thus effectively imposing filibusters. Accordingly, the minority needs to coordinate better. Its members ought to jettison the practice of stalling qualified, uncontroversial nominees. For his part, Senator McConnell should flexibly enter time concords and ask for no or minimal debate time, and fewer roll call votes, when candidates are competent and uncontroversial, while his GOP colleagues ought to eschew holds for these nominees.

Although President Obama and Democrats have correctly applied conciliatory alternatives, including consultation with, and cultivation of, Republicans as well as nomination of people whom GOP officers favor, the minority has reciprocated less than is

136. *Statement of the Honorable Patrick Leahy, United States Senator, Vermont*, SENATE.GOV (Mar. 2, 2011), http://judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da167a1ba&wit_id=e655f9e2809e5476862f735da167a1ba-0-0; see Carol J. Williams, *A Big Resume, Getting Bigger*, L.A. TIMES, Mar. 9, 2010, at A A 1; Richard Painter, *Qualified, Measured, and Mainstream: Why the Senate Should Confirm Goodwin Liu*, HUFFINGTON POST (Mar. 2, 2011, 8:39 AM), http://www.huffingtonpost.com/richard-painter/qualified-measured-and-ma_b_829298.html; David G. Savage, *Senate Judicial Confirmations Skip 2 California Nominees*, L.A. TIMES, Dec. 20, 2010, <http://articles.latimes.com/2010/dec/20/nation/la-na-senate-judges-20101221>. Republicans ultimately mounted a successful filibuster of Liu. 157 CONG. REC. S3144 (daily ed. May 19, 2011); see Carl Hulse, *G.O.P. Blocks Judicial Nominee in a Sign of Battles to Come*, N.Y. TIMES, May 20, 2011, at A 16.

137. Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary, SENATE.GOV (Feb. 3, 2011), <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da166247a> (showing a webcast of the statement of Sen. Grassley).

appropriate.¹³⁸ Should Republican senators persist in deploying tactics that slow capable, uncontroversial nominees, thus perpetuating the ninety judgeship vacancy rate, Democrats may apply cloture and employ related strategies. Democrats could even think about more drastic change, such as revamping chamber procedures, like the January 2011 abrogation of secret holds.¹³⁹ If those efforts are inefficacious, President Obama could depend on his bully pulpit to embarrass or threaten Republicans, selectively deploy recess appointments, nominate candidates for all openings to dramatize or publicize concerns regarding systematic vacancies, or perhaps make judicial appointments an election campaign issue, like the GOP has.¹⁴⁰

B. Specific Vacancies

1. Fourth Circuit

President Obama attempted to fill the South Carolina vacancy by attentively consulting with Senators Graham and DeMint, as well as Representative Clyburn, and analyzing their proposals. The Senate Judiciary Committee promptly staged a hearing and affirmation vote for Judge Floyd, and the chamber must provide the nominee expeditious floor debate and a ballot.¹⁴¹ When additional Fourth Circuit openings materialize, the White House should follow the suggestions of this Article, with changes appropriately matched to particular circumstances. For instance, were an active judge on the circuit to assume senior status, retire, or die in a presidential election year, the White House should invoke peculiar solicitude for Republican members, particularly as nominees grow more difficult to confirm when an election nears.¹⁴²

138. See *supra* notes 70–72, 115 and accompanying text; see also Bill Rankin, *Senate OKs Martin for U.S. Appeals Court*, ATLANTA J.-CONST., Jan. 21, 2010, at B4 (assessing Judge Martin's confirmation).

139. 157 CONG. REC. S296 (daily ed. Jan. 27, 2011).

140. David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1902–06 (2008); Tobias, *supra* note 14, at 772.

141. Webcast of *Executive Business Meeting*, U.S. Sen. Comm. on the Judiciary, SENATE.GOV (May 12, 2011), <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da16c4de5> (showing a webcast of the panel approval); *Statement of the Honorable Patrick Leahy, United States Senator, Vermont*, SENATE.GOV (April 13, 2011), http://judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da16ae127&wit_id=e655f9e2809e5476862f735da16ae127-0-0.

142. See Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251, 257 (2003); David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26

The administration might organize and plan for subsequent openings in the court. The Fourth Circuit experienced a second vacancy with the March 25, 2011 death of Judge M. Blane Michael.¹⁴³ President Obama must cooperate with West Virginia Democratic Senators Jay Rockefeller and Joe Manchin to select a replacement for him. There are no anticipated vacancies, although three members of the court are eligible to assume senior status and judges can always retire when they choose.¹⁴⁴ Thus, the White House should plan for this by actively consulting home state politicians and assembling “short lists” of competent individuals whom the officials will endorse.¹⁴⁵ That will assume increasing urgency when the presidential campaign approaches because the confirmation process slows and halts with the election looming.¹⁴⁶

When Senator Hagan broached the prospect of transferring a South Carolina position to her state, she mentioned the possibility of securing a fourth post for North Carolina. President Obama and senators who represent the five jurisdictions that comprise the Fourth Circuit may want to directly anticipate this issue and resolve it. However, administrations have traditionally made these decisions in consultation with the senators on a rather ad hoc basis when the vacancies arose. For example, South Carolina’s disproportionate appeals court representation is attributable to the protracted Senate and Judiciary panel service provided by Senator Strom Thurmond (R-S.C.) and the authority that he exercised.¹⁴⁷ The determination to reallocate North Carolina one position was animated by Senator Hagan’s concern that her state’s population growth merited additional circuit seats; her advocacy, which convinced the Obama Administration that North Carolina deserved more judgeships; and perhaps by the understanding of the South Carolina officials that the anachronistic remnant was becoming increasingly difficult to

CARDOZO L. REV. 479, 509 (2005); *see also supra* note 130 and accompanying text (discussing examples of situations where an administration did not consult with elected officials). *See generally* Carl Tobias, *Choosing Judges at the Close of the Clinton Administration*, 52 RUTGERS L. REV. 827 (2000) (providing advice for successful nominations for Clinton’s last year).

143. Alison Knezevich, *Late Judge Michael’s ‘Compass Set Hard for Justice,’ Jay Says*, CHARLESTON GAZETTE (Charleston, W.Va.), Mar. 26, 2011, <http://wvgazette.com/News/201103251071>; *see Archive of Judicial Vacancies, supra* note 2 (accessed by clicking on April 1, 2011 for judicial vacancies).

144. *See Archive of Judicial Vacancies, supra* note 2 (accessed by clicking on future judicial vacancies as of August 2011).

145. *See supra* Part III.A.

146. *See supra* note 142 and accompanying text.

147. *See* GOLDMAN, *supra* note 5, at 287–88, 307.

rationalize, given the marked population discrepancies between South Carolina and some other Fourth Circuit states, especially North Carolina.¹⁴⁸

Assignment choices are principally driven by the context of the specific vacancy. Senators will jealously guard their own and their state's prerogatives because circuit appointments comprise one of the signature vestiges of unalloyed patronage.¹⁴⁹ However, salient criteria for resolving these difficult questions may be articulated. These parameters should include population, senators' power, fairness, history, and custom.

2. Other Circuits

President Obama and the Senate need to expeditiously fill the remaining appellate vacancies, particularly on courts that have multiple openings, lengthy vacancies, or deadlocks, or lack nominees. The White House and senators might employ a finely-calibrated assessment of the general concepts reviewed above, which extrapolates from the practices that were successful in the Fourth Circuit, using alterations tailored to the circumstances of each court of appeals. The administration should continue following approaches that proved workable, terminate or change notions that were less so, and keep deploying conciliatory alternatives. However, if these methods are not productive, the President should be prepared to apply confrontational solutions. For their part, senators must attempt to cooperate, anticipate new disputes before they evolve into controversies, amicably resolve complications that materialize, and halt or temper behavior that is unproductive.

The District of Columbia, Second, Ninth, Tenth, and Eleventh Circuits each has more than one unfilled judgeship, long vacancies or gridlock, or lacks nominees.¹⁵⁰ The Ninth and Tenth Circuits deserve enhanced importance because they may be encountering greater quantitative and qualitative problems and comparatively urgent needs to fill all their openings. Fourth Circuit appointments may also be similar to the Ninth and Tenth Circuits.

148. See Barrett, *supra* note 32; *supra* notes 60, 63–64 and accompanying text.

149. See KEVIN M. SCOTT & R. SAM GARRETT, ASSESSING CHANGES IN STATE REPRESENTATION ON THE U.S. COURTS OF APPEALS 1 (2007), available at <http://www.kevinmccott.com/mpsa07.pdf>; GOLDMAN, *supra* note 5, at 308, 365.

150. See *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on the most recent vacancies, showing the unfilled positions for the D.C., Second, Ninth, Tenth, and Eleventh Circuits).

The Ninth Circuit has the most vacancies nationwide, three, although the situation might be less pressing than it seems at first glance because the court has twenty-nine authorized judgeships, and it relies on nearly twenty productive senior jurists.¹⁵¹ The North Carolina experience may have informed efforts to fill the Alaska circuit opening, as the jurisdiction is represented by a Democrat and a Republican.¹⁵² Thus, the President apparently consulted the lawmakers, who in turn cooperated by supporting a talented, uncontroversial nominee.¹⁵³

The appointments experiences of Judge Keenan and arguably Judge Davis yielded insight on Professor Liu's nomination for the second Ninth Circuit unoccupied judgeship.¹⁵⁴ Because Republicans deemed Liu controversial, vigorously opposed his appointment, and refused to conduct floor debate—even using procedural maneuvers to obstruct approval¹⁵⁵—Democrats eventually invoked cloture, as with Keenan, but it proved unsuccessful.¹⁵⁶

The experience with South Carolina's fourth judgeship might inform resolution of the longstanding dispute over the "Idaho" position that has remained empty since 2004 when Judge Stephen Trott took senior status.¹⁵⁷ Trott, who held the post of Assistant

151. See *Archive of Judicial Vacancies*, *supra* note 2 (accessed by clicking on May 1, 2011, showing three unfilled positions in the Ninth Circuit). The Senate failure to approve cloture for Professor Liu and his subsequent withdrawal complicate Ninth Circuit selection. See Bob Egelko, *Blocked by GOP, Liu Gives Up on Federal Judgeship*, S.F. CHRON. (May 26, 2011), http://articles.sfgate.com/2011-05-26/bay-area/29584701_1_goodwin-liu-obama-judicial-nominee-appeals-court; Ian Millheiser, Op-Ed., *The Goodwin Liu Nomination: Impaired Judgment*, L.A. TIMES, June 1, 2011, <http://articles.latimes.com/2011/jun/01/opinion/la-oe-millheiser-liu-20110601>.

152. Press Release, White House Office of the Press Sec'y, President Obama Nominates Justice Morgan Christen for the United States Court of Appeals (May 18, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/05/18/president-obama-nominates-justice-morgan-christen-united-states-court-ap>; see *supra* notes 60–72 and accompanying text; *Statement of the Honorable Patrick Leahy, United States Senator, Vermont*, SENATE.GOV (July 13, 2011), http://judiciary.senate.gov/hearings/testimony.cfm?id=3d9031b47812de2592c3baeba61a59a4&wit_id=3d9031b47812de2592c3baeba61a59a4-0-1; see also Dan Levine, *New Names Emerge for 9th Circuit Seats*, LAW.COM (July 26, 2010), <http://www.law.com/jsp/article.jsp?id=1202463876409> (offering candidates rumored to be the nominee for the Alaska vacancy).

153. See *supra* notes 60–72, 152 and accompanying text.

154. See *supra* notes 48–59 and accompanying text.

155. See *supra* note 136 and accompanying text

156. 157 CONG. REC. S3144 (daily ed. May 19, 2011); see *supra* notes 136, 151 and accompanying text; see also *supra* notes 53, 59 and accompanying text (discussing Democrats' use of pressure to secure the approval of Judge Davis and of cloture to secure the approval of Judge Keenan).

157. *Bowing To Democrats, Bush Shifts Appeals Court Nominee*, HOUS. CHRON., Jan. 17, 2007, at A7, available at <http://www.chron.com/news/nation-world/article/Bowing-to->

Attorney General when confirmed, decided to sit in Boise, Idaho, although he had practiced in California earlier and the vacancy he assumed was a California seat. Because Idaho has one active Ninth Circuit member and the Trott judgeship was previously allocated to California, California's senators have persuasively argued that the state is entitled to the position.¹⁵⁸ The White House needs to resolve this conundrum by applying the factors identified earlier and swiftly fill the opening.¹⁵⁹

Out of a dozen authorized judgeships, the Tenth Circuit has a pair of vacancies in judgeships that have traditionally been assigned to Kansas and Oklahoma, both of which are presently represented by two Republican senators.¹⁶⁰ The South Carolina experience may inform endeavors to fill these posts.¹⁶¹ Accordingly, the White House should attempt to consult and cooperate, actively open lines of communication, and evince particular solicitude for the Oklahoma politicians whom the administration seemingly did not consult before.¹⁶² For instance, the White House might consider broaching the prospect of nominating a GOP appointee, or at least a candidate who enjoys the support of the home state Republicans. Analogous concepts may apply to Kansas, yet the administration, and Democrats generally, appeared to have somewhat better relationships with politicians there, so the White House appropriately proposed a moderate, well-respected nominee.¹⁶³

The District of Columbia, Second, and Eleventh Circuits warrant less analysis. The District of Columbia Circuit, which observers assert is the nation's second most important court, differs in a plethora of

Democrats-Bush-shifts-appeals-court-1826405.php; T. R. Goldman, *Western States Clash Over Appeals Seat*, LEGAL TIMES, Feb. 27, 2006, at 3, 3.

158. See *Bowing To Democrats, Bush Shifts Appeals Court Nominee*, supra note 157; Goldman, supra note 157, at 3.

159. See supra Part IV.A–B.

160. *Archive of Judicial Vacancies*, supra note 2 (accessed by clicking on each month in 2011, showing two unfilled positions in the Tenth Circuit).

161. See supra notes 73–74 and accompanying text.

162. See supra note 130 and accompanying text.

163. Press Release, White House Office of the Press Sec'y, President Obama Nominates Steve Six to the United States Circuit Court (Mar. 9, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/09/president-obama-nominates-steve-six-united-states-circuit-court>; see John Ingold, *10th Circuit Court Opening Could Allow Obama to Balance the Appointments*, DENVER POST, Mar. 13, 2011, at B10, available at http://www.denverpost.com/news/ci_17603063. However, Kansas GOP Senators Pat Roberts and Jerry Moran have expressed opposition to the nominee. George Diepenbrock, *Judge Deanell Tacha Supports Former Kansas AG Steve Six's Nomination to Her Position on Appellate Court*, LJWORLD.COM (July 11, 2011), <http://www2.ljworld.com/news/2011/jul/11/judge-deanell-tacha-supports-former-kansas-ag-stev/>.

ways from the other regional circuits. For example, it has a disproportionate percentage of administrative law cases and no home state senators, and may even be *sui generis*.¹⁶⁴ Assiduous consultation like that which Obama employed with Fourth Circuit senators may prove helpful in eliciting recommendations for the Eleventh Circuit openings.¹⁶⁵ The Second Circuit has only a single vacancy, while the Judiciary Committee's warm reception of the nominee, District Judge Christopher Droney, at a June 2011 hearing suggests that the excellent, uncontroversial nominee will receive prompt confirmation.¹⁶⁶

CONCLUSION

Analysis of Fourth Circuit judicial selection in the Obama Administration's first half-term and the 111th Senate demonstrates that the President and the Senate have successfully filled numerous openings that appeared to erode the court's delivery of justice. The appointees are experienced jurists, who are of diverse ethnicity and gender, but their ideological views remain unclear. The practices applied furnish a constructive model for subsequent vacancies that occur in the Fourth Circuit and the remaining appellate tribunals and future confirmation efforts. The administration must aggressively consult with Democratic and Republican home state senators and elected officials. Those officers should search for, analyze, and propose candidates who are intelligent, diligent, independent, and

164. Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159, 161 (1993); see David Ingram & Mike Scarcella, *Obama Nominates N.Y. Lawyer to D.C. Circuit*, BLOG OF LEGALTIMES (Sept. 29, 2010, 4:55 PM), <http://legaltimes.typepad.com/blt/2010/09/obama-set-to-nominate-ny-lawyer-to-dc-circuit.html> (treating District of Columbia Circuit as second most important court and first Obama nominee). Because many Supreme Court Justices are drawn from the District of Columbia Circuit, both parties scrutinize and may obstruct the others' nominees, as happened with the 1990s nominations of John Roberts and Elena Kagan. This may explain Obama's delayed nominations.

165. One vacancy occurred in February 2011, when Judge Susan Black took senior status and the other occurred in August 2010, when Judge Stanley Birch retired from the court. Georgia Republican Senators Clarence Saxby Chambliss, Jr. and John Hardy Isakson have cooperated with Obama to fill the jurisdiction's appellate and district court vacancies. See Bill Rankin, *Senate Fills Two Positions on Bench*, ATLANTA J.-CONST., Mar. 1, 2011, at B1, available at 2011 WLNR 3961859; Rankin, *supra* note 138.

166. Webcast of *Judicial and Executive Nominations*, U.S. Sen. Comm. on the Judiciary, SENATE.GOV (June 22, 2011), <http://judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3baeba6007bc2> (showing webcast of nomination hearing); see Edmund H. Mahony, *Droney Breezes Through D.C. Confirmation Hearing for 2nd Circuit*, HARTFORD COURANT (Hartford, Conn.), June 22, 2011, <http://www.courant.com/community/west-hartford/hc-droney-2ndcircuit-0623-20110622,0,3221439.story>.

ethical as well as possess balanced judicial temperament. The administration must seriously consider the candidates proffered and nominate well-qualified uncontroversial prospects. Home state senators must concomitantly facilitate the confirmation of highly competent uncontroversial nominees by appearing at Judiciary Committee hearings to voice enthusiastic support. The senators should correspondingly urge the committee and Senate leadership to expedite review by swiftly arranging committee hearings and votes as well as floor debates and votes. If the administration and the Senate cooperate in the nomination and confirmation processes, the Fourth Circuit will be able to operate with the full complement of fifteen judges authorized and the remaining regional circuits should be able to function with all of their judges, while the reduced vacancies will enable the courts to resolve appeals more promptly, inexpensively and fairly.